

1 STATE OF MINNESOTA DISTRICT COURT

2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

3 - - - - -

4 The State of Minnesota,

5 by Hubert H. Humphrey, III,

6 its attorney general,

7 and

8 Blue Cross and Blue Shield

9 of Minnesota,

10 Plaintiffs,

11 vs. File No. C1-94-8565

12 Philip Morris Incorporated, R.J.

13 Reynolds Tobacco Company, Brown

14 & Williamson Tobacco Corporation,

15 B.A.T. Industries P.L.C., Lorillard

16 Tobacco Company, The American

17 Tobacco Company, Liggett Group, Inc.,

18 The Council for Tobacco Research-U.S.A.,

19 Inc., and The Tobacco Institute, Inc.,

20 Defendants.

21 - - - - -

22 DEPOSITION OF DAVID T. SCHEFFMAN, Ph.D.

23 Volume I, Pages 1 - 301

24

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1 (The following is the Deposition of DAVID
2 T. SCHEFFMAN, Ph.D., taken pursuant to Notice of
3 Taking Deposition, at the offices of Dorsey &
4 Whitney, Attorneys at Law, Pillsbury Center South,
5 220 South Sixth Street, Minneapolis, Minnesota, on
6 September 24, 1997, commencing at approximately 8:33
7 o'clock a.m.)

8 APPEARANCES:

9 On Behalf of the Plaintiffs:

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17

18 On Behalf of Philip Morris Incorporated:

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3 David T. Scheffman, Ph.D. Mr. Gill 5

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7 E X H I B I T I N D E X

8	EXHIBIT	DESCRIPTION	MARKED
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9 Plfs.'

10 Ex. 3527 Memorandum of Sep 30, 1963, 290

11 from F.S., Re: L&M,

12 LG 2019842-46

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1 P R O C E E D I N G S

2 (Witness sworn.)

3 DAVID T. SCHEFFMAN, Ph.D.,

4 having been called as a witness and having been first
5 duly sworn, testified under oath as follows:

6 EXAMINATION

7 BY MR. GILL:

8 Q. Dr. Scheffman, if any of my questions today and
9 tomorrow aren't clear would you let me know about
10 that so that I can rephrase?

11 A. Yes.

12 Q. If you don't mention anything I'll assume you
13 did understand the questions. Is that fair enough?

14 A. Okay.

15 Q. How did you happen to be retained on this case?

16 A. That was quite a while ago. I have -- it is my
17 recollection I was called by Mr. Schwartzbauer.

18 Q. How long ago was it approximately?

19 A. I think that was probably January.

20 Q. Of 97?

21 A. Yes.

22 Q. And was Mr. Schwartzbauer someone that you knew
23 previously?

24 A. Yes.

25 Q. How had you known Mr. Schwartzbauer previously?

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- 1 A. I had worked with him on some matters.
- 2 Q. As a consultant?
- 3 A. Yes.
- 4 Q. How many cases had you worked with Mr.
- 5 Schwartzbauer on as a consultant?
- 6 A. I don't remember for sure. One I can think of.
- 7 Q. Did that involve any horizontal restraint of
- 8 trade allegations?
- 9 A. Well I don't know what you mean by
- 10 "horizontal". It involved antitrust allegations.
- 11 Q. Did it involve restraint of trade?
- 12 A. Allegations, yes.
- 13 Q. Allegations of a conspiracy?
- 14 A. No, I don't believe so.
- 15 Q. Did it involve horizontal conduct by competitors
- 16 or -- or vertical conduct?
- 17 A. It's quite a while ago, but I -- my recollection
- 18 it involved single firm conduct.
- 19 Q. Are you working on any other tobacco case other
- 20 than the Minnesota case?
- 21 A. No.
- 22 Q. And no one has approached you in connection with
- 23 providing consulting services on any other tobacco
- 24 case other than this one?
- 25 A. Yes, no one has approached me.

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1 Q. Okay. And other than this specific case, have
2 you ever provided consulting services to a law firm
3 that was representing any tobacco company clients, in
4 that particular matter for which you were consulted?

5 A. Yes.

6 Q. Approximately how many times?

7 A. Twice.

8 Q. Will you tell me about those, please?

9 MR. SCHWARTZBAUER: Could we go off the
10 record for a second?

11 MR. GILL: Sure.

12 (Brief recess from 8:37 to 8:38 a.m.)

13 BY MR. GILL:

14 Q. Are you able to answer the question now, Dr.
15 Scheffman?

16 MR. SCHWARTZBAUER: Before he does, could
17 we agree that we designate this portion as
18 confidential? As you'll find out, he did consult in
19 another case and we're not sure the extent to which
20 there is a confidentiality order or the extent to
21 which his disclosure would violate something in that
22 case. Until we find out can we classify this as
23 confidential?

24 MR. GILL: Until we find out that's fine,
25 Bob.

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1 (Reporter interruption.)

2 MR. SCHWARTZBAUER: No.

3 MR. GILL: No, just -- just this answer to
4 this question and any follow up to this specific
5 question.

6 A. A few years ago I was contacted by a law firm as
7 to whether I would write a paper on brand equity and
8 the value of brand names and the transferability of
9 brand names. The client for the law firm was U.S.
10 Tobacco. I believe the law firm submitted the report
11 to the FTC.

12 Q. I think you mentioned there were a couple of
13 occasions.

14 A. There was another case in which I was retained
15 by lawyers for I guess Philip Morris in connection
16 with its litigation with ABC.

17 Q. And what was the issue that you were addressing
18 in that matter?

19 A. Brand equity. Potential effects of the disputed
20 show on the brand equity of Philip Morris brands.

21 Q. On the value of those brands?

22 A. Right.

23 Q. And which law firm was it that retained you in
24 that matter?

25 A. I don't remember. It was a New York law firm.

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1 Q. Are your consulting services in this particular
2 matter being provided to Mr. Schwartzbauer and his
3 law firm, or -- or to additional law firms?

4 A. I don't really know.

5 Q. As far as you know it's simply Mr. Schwartzbauer
6 and Dorsey & Whitney?

7 A. I -- I don't really know.

8 Q. All right. I guess I'm not clear. Are you
9 telling me you're not really sure with whom you're
10 consulting?

11 A. Well I've certainly consulted with Mr.
12 Schwartzbauer and with lawyers for other firms. I
13 send the -- my firm sends bills to Mr. Schwartzbauer.

14 Q. And who are -- what other law firms have you
15 consulted with on this case, other than Dorsey &
16 Whitney?

17 A. That I have -- I don't know what you mean by
18 "consulted". That I've had conversations with?

19 Q. Yes, met with, reported to, that sort of thing.

20 A. Well, we have -- I've met Mr. Eiszner before and
21 Jon, I forget your last name, from Arnold & Porter.

22 Q. And is it your understanding that Dorsey &
23 Whitney represents Philip Morris in this matter?

24 A. I think that's right.

25 Q. Do you have an understanding as to whom Mr.

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- 1 Eiszner represents?
- 2 A. I think Lorillard, but I'm not sure.
- 3 Q. Do you have an understanding as to whom Mr.
- 4 Streeter represents?
- 5 A. No, I don't remember.
- 6 Q. I take it that since January of 97 when you
- 7 agreed to provide consulting services to Dorsey &
- 8 Whitney on this case you've been keeping track of the
- 9 time that you've devoted to this matter?
- 10 A. Yes.
- 11 Q. And I -- I take it you've been sending out
- 12 monthly or quarterly statements for your services?
- 13 A. Well the firm I'm affiliated with does that.
- 14 Q. You turn your time into the firm with which
- 15 you're affiliated and the firm submits statements to
- 16 Dorsey & Whitney?
- 17 A. Yes.
- 18 Q. Approximately how many hours have you devoted to
- 19 this matter since you agreed to perform consulting
- 20 services?
- 21 A. I -- I haven't kept track of that. I think it's
- 22 something over 300 I would guess.
- 23 Q. Since we're just about to the end of the ninth
- 24 month of this year, have you been devoting something
- 25 in the area of 30 to 40 hours or so per month to this

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- 1 matter? Does that sound about right?
- 2 A. Well, yes, and it depends what you mean by
- 3 that. I -- the -- I haven't -- it's -- I've been
- 4 busier some months than others. Busier in the month
- 5 obviously that's proximate to finalizing the report.
- 6 Q. But that sounds like a reasonable average,
- 7 considering the fact that there would be months that
- 8 would be heavier and those months that would be
- 9 lighter?
- 10 A. I don't know what you mean by "average". I
- 11 think -- again I think it's over 300, and you could
- 12 divide by the months if that's easier.
- 13 Q. Now the firm with whom you are associated on
- 14 litigation matters is called what again?
- 15 A. Law & Economics Consulting Group.
- 16 Q. And I understand that you're a principal for Law
- 17 & Economics Consulting Group?
- 18 A. Yes.
- 19 Q. Does that mean that you're a shareholder?
- 20 A. No.
- 21 Q. You simply have a contract with that
- 22 organization or some sort of an agreement by which
- 23 you're compensated for the time that you devote to
- 24 consulting services what the firm bills?
- 25 A. Well I'm not an employee, I'm an affiliate. I'm

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1 an academic affiliate.

2 Q. How is your compensation from the firm
3 determined?

4 A. Generally by what I bill.

5 Q. And do you receive a percentage -- as I
6 understood it -- let me strike that question.

7 As I understood it, the bills are sent by the
8 firm to the Dorsey & Whitney law firm?

9 A. Yes.

10 Q. Now I take it the firm that does the billing and
11 with whom you're associated retains some portion of
12 whatever they bill in your name?

13 A. No, well, the arrangement is that I do
14 litigation consulting through the firm and use their
15 staff as support.

16 Q. So you receive 100 cents on the dollar in terms
17 of -- of the time that you have devoted to the matter
18 and the firm makes money by billing the time of their
19 employees?

20 A. Yes.

21 Q. How many of -- of the firm's employees have been
22 assisting you in your consulting work on this case?

23 A. Well I don't -- I don't know the exact count.

24 It's a big case, so there's -- you know, we've added
25 various -- over time probably more than six

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1 individual people involved in the case.

2 Q. And what do those individuals do to assist you?

3 A. Do case management, read documents, do data
4 analysis, and search of public literature, produce
5 tables and graphs.

6 Q. What's the name of the senior individual at Law
7 & Equity that has been assisting you on this case?

8 A. Well we're not that structured, but I certainly
9 have a colleague, longtime colleague, there who has
10 roughly filled that role named John Peterman.

11 Q. What is Mr. Peterman's title with Law & Equity?

12 A. Principal.

13 Q. And does Mr. Peterman also have an academic
14 background, as -- as a teacher?

15 A. Background, yes.

16 Q. Does he have another job just as you have
17 another job?

18 A. No.

19 Q. He works full time, as you understand it, for
20 Law & Equity?

21 A. Again, he's not an employee, he's a --

22 Q. Full time with --

23 A. Yes.

24 MR. EISZNER: Just so the record is clear,
25 I believe it's Law & Economics Consulting Group, not

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1 Law & Equity, Mr. Gill.

2 MR. GILL: Thank you.

3 Q. Law & Econ -- I'll just call it Law & Economics
4 and you'll know what we're talking about; --

5 A. Yes.

6 Q. -- right, Dr. Scheffman?

7 I take it that you see the statements prepared
8 by Law & Economics before they're submitted to Dorsey
9 & Whitney?

10 A. Well I see the information that goes into the
11 statements.

12 Q. In addition to your approximately 300 hours of
13 time on this matter, how much time has been devoted
14 to this matter by other individuals associated with
15 Law & Economics, just approximately?

16 A. I really don't know, because there's a lot of
17 people and I -- you know, I'm not the -- have not
18 been the case manager.

19 Q. Who would be the case manager?

20 A. Well at various -- we've had different people at
21 various times, but for --

22 Q. During this nine months?

23 A. Yeah.

24 Q. Who have been the various case managers?

25 A. Well we didn't have -- I guess actually the case

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1 managers have been either me, or in production of the
2 report we had someone serving as the case manager,
3 his name is Cliff Hamal, H-a-m-a-l.

4 Q. Anybody else who's been case manager?

5 A. Not really, and that's not -- we don't have
6 formal titles, but this is my case and I use Cliff to
7 organize things and supervise research assistants and
8 make sure stuff got done when it was supposed to, et
9 cetera.

10 Q. And based upon the total effort under your
11 direction to the extent that you informally filled
12 the role of case manager and under Mr. Hamal's,
13 approximately how many hours has Law & Economics
14 staff devoted on this matter?

15 A. Hundreds of hours.

16 Q. Recognizing that you don't, as you sit here,
17 know -- know exactly, are we talking about several
18 multiples of your 300 hours if we looked at it
19 collectively?

20 A. I don't know what several multiples --

21 Q. Five, ten times?

22 A. I don't think ten times, but I don't know. It
23 could be -- it could be five times. I don't know
24 whether it could be that much. It's more than my
25 number of hours certainly because there was a lot

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1 more people.

2 Q. Approximately what percentage of your gainful
3 employment time do you devote to your work with Law &
4 Economics as opposed to your work as a Professor of
5 Economics?

6 MR. SCHWARTZBAUER: Object to the form.

7 A. Well I'm not a professor of -- well I'm a
8 Professor of Economics I guess. I don't know. It
9 varies.

10 Q. Between what and what?

11 A. It varies as to -- you know, as to the year and
12 what I'm working on at the time.

13 Q. How about 1997?

14 A. Well, 1997'S unusual because I went on leave in
15 the beginning of May and I've been pretty much
16 working full time on consulting for this period.

17 Q. So you've gone on leave from Vanderbilt
18 University, your position at Vanderbilt University
19 since May?

20 A. On semi leave, yes.

21 Q. What does "semi leave" mean?

22 A. Well it means that I'm -- I'm actually doing
23 some teaching this year still but I'm away from
24 campus except when I'm teaching.

25 Q. And what is it that you are teaching this

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- 1 semester?
- 2 A. Teaching strategic management to executive
- 3 M.B.A.'s.
- 4 Q. And how often do you teach those classes?
- 5 A. Every other weekend.
- 6 Q. Is it on both Saturday and Sunday, every other
- 7 weekend?
- 8 A. One class, one three-hour class typically every
- 9 other weekend.
- 10 Q. And for how long do you expect that arrangement
- 11 to continue? In terms of beyond the semester. Are
- 12 there -- are there plans for --
- 13 A. I'm on partial leave this year and so -- and
- 14 then I will be -- expect to be off campus except for
- 15 teaching that course, and then in March I will be
- 16 teaching regular M.B.A. classes.
- 17 Q. Back on campus?
- 18 A. Yes.
- 19 Q. And where do you teach the -- the M.B.A. course
- 20 that you're teaching this semester, in Washington?
- 21 A. In Van -- in Nashville.
- 22 Q. And during the spring semester of -- of 1997
- 23 what were your teaching assignments at that time?
- 24 A. I taught -- well, we don't have semesters now,
- 25 we have modules, so --

- 1 Q. Is that like a quarter or like a semester or --
- 2 A. No, it's like a module.
- 3 Q. Tell me what a module is?
- 4 A. It's shorter -- it's shorter than a quarter. We
- 5 divided -- last -- last academic year we changed our
- 6 program and had four mods. They're not really
- 7 quarter length, they're 7-week periods.
- 8 Q. And during the last 7-week module of the last
- 9 academic year what were you teaching?
- 10 A. I think two courses.
- 11 Q. And which courses were those?
- 12 A. Strategic Management for Consultants and
- 13 Financial Analysts and Management and Evaluation of
- 14 Intellectual Property.
- 15 Q. And were those three-hour courses per week,
- 16 three or four?
- 17 A. Well, that program works differently. That
- 18 works as shorter classes so we have -- it's like two
- 19 1 1/2 a week, yeah, and adds up to around 3 hours a
- 20 week.
- 21 Q. And teaching two three-hour courses per week, is
- 22 that considered a full load as a -- as a professor,
- 23 full teaching load, or is it something less than
- 24 that?
- 25 A. Well depends what you mean in a -- you can't --

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1 the teaching load's really determined on an annual
2 basis. You can't look within a mod to determine a
3 teaching load.

4 Q. During the 1996-1997 academic year did you have
5 a full teaching load if you looked at it on the
6 entire academic year basis?

7 A. Yes.

8 Q. And during that academic year, 1996 through the
9 spring of 1997, what was the approximate division of
10 your time between your teaching duties through
11 Vanderbilt and your consulting duties through Law &
12 Economics?

13 A. Well you really can't get -- my -- my teaching
14 duties are my only duties at Vanderbilt so it's
15 really duties of Vanderbilt versus consulting and
16 then it gets more complicated because they're
17 somewhat interrelated.

18 Q. Well do the best you can between the division
19 regarding Vanderbilt on the one hand and Law &
20 Economics on the other?

21 A. I -- I've never really analyzed that.

22 Q. Well since you're in a much better position to
23 try to analyze it than I am, is it in the area of
24 50/50, is it more like 90/10?

25 A. Well it's more like 50 -- well it's more like

1 50/50 than 90/10.

2 Q. And where would you split -- where would you
3 have devoted most of your gainful employment
4 activities during the 1996-97 academic year, to
5 Vanderbilt or to Law & Economics?

6 A. Well I've told you I've never assessed that. I
7 told you I'd agree it's more like 50/50 than 90/10.

8 Q. Since you went on leave, that would have been in
9 May of 97; is that correct, --

10 A. Yes.

11 Q. -- approximately what percentage of your gainful
12 employment activities have you been devoting to Law &
13 Economics?

14 A. Well when I -- well, I should correct. I'm not
15 devoting my activities to Law & Economics, I'm
16 devoting my activities to what I choose to do, so.

17 Q. I'm trying to separate out, Dr. Scheffman,
18 things like vacations, hobbies, going to movies,
19 things like that, I'm not interested in how you're
20 spending that portion of your life, but in terms of
21 the portion of your life that you have been devoting
22 to activities that generate income for you since you
23 went on leave at Vanderbilt in the spring of 97,
24 approximately what percentage of those activities
25 have related to consulting work that you do in

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1 connection with Law & Economics or private, as
2 opposed to the time that you're still spending
3 related to teaching duties at Vanderbilt or other
4 obligations that you have to Vanderbilt?

5 MR. SCHWARTZBAUER: Objection; asked and
6 answered.

7 A. Again I don't assess this, but I -- I've
8 certainly devoted more time over the summer, because
9 I haven't been on campus, to consulting projects, but
10 I don't know if you know what a professor does, which
11 primary -- one of our primary activities is research,
12 I wrote a paper over the summer, I engaged in some
13 other research activities, I had course preparation
14 involved with this fall course and things, so I did
15 those things, but I did relatively more consulting
16 over the summer period.

17 Q. And including preparation for teaching your
18 classes and including research work that you're doing
19 in connection with your position as a professor at
20 Vanderbilt and then comparing that to consulting work
21 for which you are paid by law firms or businesses,
22 what would be the approximate breakdown in time since
23 May of 97?

24 A. I --

25 MR. SCHWARTZBAUER: Objection; asked and

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1 answered.

2 A. I told you, I've never assessed that. I've done
3 relatively more obviously consulting since I've been
4 off campus.

5 Q. Who else have you been consulting with since you
6 took your leave in May of 97 other than Dorsey &
7 Whitney and these other law firms in connection with
8 this case?

9 MR. SCHWARTZBAUER: Objection; it's
10 confidential. Why is that relevant to know the names
11 that he's consulting for.

12 MR. GILL: I'm just trying to, again, get
13 an idea of how much of your consulting work is
14 directed to this case and how much if it is directed
15 to other matters, I'm not going to get into the
16 nitty-gritty details of other matters.

17 MR. SCHWARTZBAUER: Well the names of his
18 clients are also confidential in many instances. I
19 mean you've asked him about his tobacco consulting.
20 I'll concede for purposes of this deposition that --
21 that may have some relevance, but I don't see how the
22 names of his other clients are relevant nor should be
23 disclosed.

24 BY MR. GILL:

25 Q. Let's go at it this way, Dr. Scheffman: Of the

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1 consulting work that you've been doing since you took
2 this leave of absence from Vanderbilt, approximately
3 how much of that has related to this Minnesota
4 tobacco case versus the other consulting that you
5 have done in that period of time?

6 A. Well again, I'll give you the same answer. I
7 can -- I don't know whether you want to get through
8 this or not, but in May and June, which were the
9 primary times when the report was being prepared,
10 certainly most of my consulting activities were
11 involved in this case. Since that time that has not
12 been true.

13 Q. And approximately how many other consulting
14 matters have you been devoting your time to since May
15 and June?

16 A. Since May and June. Mainly one.

17 Q. Is that related to litigation in some way?

18 A. It's not a matter in litigation.

19 Q. And it doesn't involve any work for tobacco
20 companies or -- or their law firms?

21 A. That's correct.

22 Q. Now in connection with the report that you've
23 prepared in this case, did anyone else have a hand in
24 authoring the report other than yourself?

25 A. You have to explain what -- what you mean by

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1 "authoring the report".

2 Q. Choosing the words, the language in either the
3 main text, the footnotes or the supplementary
4 information that you provided?

5 A. The final report was done on my computer by me.
6 Certainly had input from people at LECG.

7 Q. Did it have input from anybody outside of Law &
8 Economics?

9 A. Well, you have to tell me what you meant by
10 "input". I meant by -- I was just -- I meant by
11 "input" that people might give me hard copy or
12 computer files with things that I might incorporate
13 in the report when I wrote it. No one outside LECG
14 gave me anything like that.

15 Q. Did anyone outside of Law & Economics provide
16 you with any draft language for your consideration to
17 use in any portion of the report?

18 A. No.

19 Q. And the portion of the report that cites case
20 law in the antitrust area, was that all drafted by
21 you?

22 A. Yes.

23 Q. The footnotes that cite various documents as
24 support for propositions contained in the report,
25 were those documents all identified and selected by

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1 you?

2 A. For final inclusion, yes. Of course I had --
3 there are many documents and I had the support of
4 people at LECG in -- in doing that process. My -- I
5 made the final cut as to what was in what footnotes.

6 Q. And did any lawyer on behalf of any of the
7 tobacco company Defendants in this case submit any
8 draft language to you for purposes of possible
9 inclusion in your report?

10 A. No.

11 Q. Did you conduct any interviews with any
12 individuals in connection with the preparation of the
13 report?

14 A. Yes.

15 Q. Approximately how many interviews?

16 A. I think one.

17 Q. Okay. With whom?

18 A. It was a telephone interview I think with
19 someone with -- in Philip Morris who was responsible
20 for dealing with distribution and sales for Philip
21 Morris in this -- in the territory that included
22 Minnesota or Minneapolis.

23 Q. Do you recall the name of that individual?

24 A. No.

25 Q. Did you make any notes of the telephone

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1 conversation?

2 A. I don't recall. It was quite a while ago.

3 Q. What was your specific purpose in conducting
4 that particular interview?

5 A. Again, that was a long time ago, but my
6 recollection is it dealt with distribution of Philip
7 Morris products and general issues of pricing in
8 Minnesota.

9 Q. Were you attempting to verify that Philip Morris
10 products were indeed distributed in Minnesota?

11 A. No.

12 Q. What was it about the distribution of Philip
13 Morris products in Minnesota that was pertinent to
14 your work on this case?

15 A. I think there had been various researchers,
16 others, at some times in the past that have studied
17 the industry had opined that there were certain
18 features of pricing of tobacco products that may have
19 been related to state regulations that would restrict
20 price competition, and I was -- in connection with
21 looking into that topic I talked to him about that,
22 see, because there are -- there are -- there was in
23 principle state minimum price regulation in place in
24 Minnesota.

25 Q. So you simply wanted to find out if there was

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1 some minimum cigarette pack price in effect in
2 Minnesota as a result of some state regulation?

3 A. That was part of it.

4 Q. And what was the rest of it that was pertinent
5 to your call?

6 A. Well the -- the situation with him was just what
7 was the -- we had found the state regulation, but we
8 didn't under -- we didn't know whether it was
9 enforced or what it meant so we talked to him from
10 his perspective.

11 Q. And this conversation would have occurred
12 approximately when?

13 A. Probably May or early June.

14 Q. You didn't contact any individuals within the
15 tobacco industry to discuss the plausibility of a
16 conspiracy to suppress information regarding smoking
17 and disease, anything like that?

18 A. No.

19 Q. Did you have any understanding that it would not
20 have been appropriate to have contacted tobacco
21 company employees or former employees for interviews?

22 MR. SCHWARTZBAUER: I'm going to object to
23 the question for the record. I'm not sure what kind
24 of an understanding you're after. If you're seeking
25 again communications with counsel, that would be

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1 privileged, and I instruct him not to divulge that.

2 If you have an understanding apart from any

3 communications with counsel, you can answer that

4 question.

5 A. I didn't have any understanding.

6 Q. During the course of your work on this case and

7 specifically with regard to preparing your report,

8 did you create any notes?

9 A. Not really. I don't work that way. That is, I

10 -- what -- the way I work, most of what would be

11 notes were earlier parts that were incorporated or

12 rejected as part of what eventually became the

13 report.

14 Q. Well that's typically the way notes are used in

15 terms of an assignment to create a report; true?

16 A. No, this is a little different, because it's not

17 notes per se, but it's more here's my draft of -- on

18 this issue at this point, my draft at that point on

19 what I thought I had to say about a particular issue.

20 Q. And what has happened to those drafts?

21 A. They all got -- in terms of the computer they

22 all got modified, discarded and whatever,

23 incorporated into the final report.

24 Q. Are you saying you no longer have any copies of

25 any drafts?

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- 1 A. That's correct.
- 2 Q. But as you went through -- you've reviewed a
3 great deal of documents in connection with this case;
4 have you not?
- 5 A. Yes.
- 6 Q. You created no notes in connection with your
7 review of those documents?
- 8 A. I did some things that were -- that became
9 incorporated in the report, but again that --
10 normally that's the way I would do it and I might do
11 some highlighting of documents.
- 12 Q. But are you telling me, Dr. Scheffman, that you
13 at the present time don't have any pieces of paper
14 with your handwriting on it in your file that
15 pertains to the work that you have done in this case?
- 16 A. Yes.
- 17 Q. You discarded any such pieces of paper that you
18 created along the way?
- 19 A. Well again, there wouldn't be -- there wouldn't
20 be -- there have been little, if any, things with my
21 handwriting on them.
- 22 Q. Were you provided handwritten notes from members
23 of the staff at Law & Economics in connection with
24 your work on this case?
- 25 A. I don't think so.

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1 Q. Did the staff at Law & Economics provide you
2 with drafts of your report or portions of your report
3 or supplements to your report?

4 A. No, they -- they provided me with hard copy and
5 computer files of summaries, research, tabulations,
6 et cetera.

7 Q. Were these summaries written in a -- in a
8 narrative fashion providing information to you
9 concerning the contents of documents and reports?

10 A. Not documents. I think mostly -- it was mostly
11 summaries of public source information.

12 Q. And what has happened to those?

13 A. They've all been -- went into the computer and
14 they either ended up in the report or they don't
15 exist any more.

16 Q. So you're indicating that other than copies of
17 the report which has been provided to the State of
18 Minnesota and Blue Cross Blue Shield, your -- your
19 file at Law & Economics on this matter doesn't
20 reflect any of the paper that was used to prepare the
21 report other than documents that have -- have
22 specifically been provided to you for review from the
23 files of the Defendants?

24 A. No, that's not what I said.

25 Q. Aside from the copies of the actual documents

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1 that you have reviewed that were provided to you from
2 the files of Defendants and perhaps the files of --
3 of the State of Minnesota and Blue Cross Blue shield,
4 what other types of documents does your -- your file
5 contain on this case?

6 A. Oh, as to what -- I must have misunderstood your
7 question. As to what the file contains, the file
8 contains the report and the documents.

9 Q. The documents from the files of the Defendants
10 and if you've --

11 A. Yes.

12 Q. -- received any from the Plaintiffs?

13 A. Yes.

14 Q. And that's all?

15 A. Yes.

16 Q. And is that the way that you typically work in
17 your -- in connection with your consulting on
18 litigation matters?

19 A. Well it depends on the case. The counsel's
20 agreement in this case is that anything existed as of
21 July 1st would be produced and -- but nothing had to
22 be produced other than the report.

23 Q. And what existed on July 1st other than the
24 report?

25 A. Nothing.

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1 Q. Because prior to that date everything else had
2 been discarded?

3 A. Well, again, most of it -- it wasn't that
4 different from most litigation matters these days
5 where you do a report, which is most everything you
6 have is actually in the report at the time,
7 particularly you don't -- and I don't ever keep
8 drafts. I think if the stuff goes in the computer
9 and you have a final thing that comes out. But -- so
10 it was -- it was fairly similar in that respect.

11 Q. You've been doing consulting work on litigation
12 matters since approximately when?

13 A. Consulting work on litigation?

14 Q. Yes. Retained by a law firm to provide
15 consulting work in connection with a lawsuit or a
16 potential lawsuit.

17 A. Well I have done some of that at various times.

18 Q. And approximately when did you start? That's
19 what I'm trying to find out.

20 A. The first time I did such a thing?

21 Q. Yes.

22 A. Probably 1982.

23 Q. And since 1982 approximately how many litigation
24 matters have you consulted on? 10? 50? 100? 500?

25 A. Well you have my resume, and that shows,

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1 indicates ones I was deposed or furnished a report,
2 and then I've worked on a number of other -- you're
3 talking about things in litigation?

4 Q. Yes, again where you were -- where you were
5 retained by a law firm to provide consulting services
6 in connection with a litigation matter.

7 A. Matter in litigation?

8 Q. Yes.

9 A. I -- you know, there's probably -- you know,
10 there's more than -- than is in my resume, or things
11 that I never produced a report or was not deposed or
12 didn't testify.

13 Q. Give me your best estimate, Dr. Scheffman. I'm
14 not going to hold you to a specific number, in you
15 haven't made such a review in the last 24 hours, but
16 give me your best estimate of approximately how many
17 such matters like that there have been?

18 A. As I say, more -- more than on my resume. Maybe
19 the total might be -- the total including ones on the
20 resume might be three times the ones -- the number in
21 the resume. I don't really know. It's more.

22 Q. How many would you estimate are in the resume?

23 A. I don't remember. I mean a lot of those -- some
24 of those matters aren't in litigation, so.

25 Q. Well in terms of the litigation matters in the

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1 resume in which you issued a report or were deposed,
2 are we talking approximately a dozen, two dozen, five
3 dozen?

4 MR. SCHWARTZBAUER: Objection; the resume
5 speaks for itself.

6 Q. Without taking the time to go through it.

7 A. Are you asking me on my resume?

8 Q. Yes, well --

9 A. I mean that's -- I really -- if we want to look
10 at the resume. I really don't know the number. I've
11 never thought about it.

12 Q. You wouldn't be able to estimate it at all
13 unless we went through each and every one of them; is
14 that what you're saying?

15 A. I don't know that we'd have to go through it, we
16 could just count them, they're all in one part of the
17 resume.

18 Q. Why don't you make a quick count.

19 (Witness reviewing document.)

20 THE WITNESS: Well where's -- where's my
21 resume?

22 MR. GILL: Let the record show that I've
23 now provided Dr. Scheffman with a copy of his report
24 in this case.

25 (Witness reviewing document.)

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1 A. I don't think this -- oh, here it is. Things in
2 litigation. I say roughly 21.

3 Q. And of say the roughly 20 matters, in how many
4 of those matters did you conduct interviews with
5 individuals in the course of reaching your opinions
6 in the case?

7 A. I don't know.

8 Q. Any?

9 A. Yes.

10 Q. Most? A few?

11 MR. EISZNER: The record should reflect
12 that counsel has taken back the Expert Report.

13 THE WITNESS: Right.

14 A. I think most.

15 BY MR. GILL:

16 Q. Why did you choose not to conduct interviews in
17 this case?

18 A. Because I didn't -- I didn't come up with
19 anything that I needed clarified. There's a
20 tremendous amount of documentary in the documents and
21 public information that sort of speaks for itself.

22 Q. You didn't think some input from individuals who
23 were employees of tobacco companies would have been
24 of assistance in terms of analyzing the -- the
25 evidence with respect to the formation of your

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1 opinions?

2 MR. EISZNER: I'm going to object to the
3 question on the grounds that it assumes facts not in
4 evidence. He's testified that he's had an interview.

5 MR. GILL: Jim, we do have a rule with
6 regard to anything that comes close to being a
7 speaking objection and another rule that only one
8 lawyer is supposed to be making objections during the
9 deposition.

10 MR. SCHWARTZBAUER: Well I don't think
11 that's accurate as to the second part, but -- I think
12 any counsel representing any client can make an
13 objection, Dick.

14 BY MR. GILL:

15 Q. Could you answer the question, Dr. Scheffman?

16 A. You have to repeat it, please.

17 (The record was read by the reporter.)

18 A. Well I -- I obviously didn't think it was
19 necessary to do my report.

20 Q. Have a number of your previous consultations
21 involved restraint of trade issues?

22 A. Yes.

23 Q. And of those restraint of trade cases have a
24 number of those involved allegations of a horizontal
25 conspiracy among competitors?

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- 1 A. Some.
- 2 Q. Approximately how many?
- 3 A. What do you mean by "horizontal"? You mean
- 4 Section 7? Section 1?
- 5 Q. Section 1, but with respect to an agreement
- 6 among competitors that would have the effect of
- 7 restraining trade.
- 8 A. I don't -- I think a few. Three, four maybe.
- 9 Q. Of the three or four that come to your mind in
- 10 response to that question, did you ever opine that
- 11 such a conspiracy existed?
- 12 A. In -- in private litigation.
- 13 Q. What do you mean by "private litigation"?
- 14 A. Well I was a longtime employee of the FTC.
- 15 Q. I'm still not sure what you mean by "private
- 16 litigation".
- 17 A. Well I'm talking about in -- in -- we've been
- 18 focusing on my work as a consultant in litigation.
- 19 We haven't talked anything about what I did at the
- 20 FTC.
- 21 Q. All right. Let me try to sort out those last
- 22 few answers. In connection with your consulting work
- 23 for law firms in antitrust litigation that involved
- 24 allegations of horizontal conspiracies in restraint
- 25 of trade, have you ever reached the opinion that such

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1 a conspiracy existed?

2 A. In a final report or testimony?

3 Q. In a final report or through testimony.

4 A. I don't think so.

5 Q. And when you told me previously that you can

6 recall three or four cases involving allegations of a

7 horizontal conspiracy in restraint of trade, I take

8 it that you opined in those cases that no such

9 conspiracy existed?

10 MR. SCHWARTZBAUER: Objection to form.

11 A. I think I actually have testified or produced a

12 report in only two matters like that, I'm talking

13 about Section 1 type allegations, and in those cases

14 my opinion was that the evidence was inconsistent

15 with a conspiracy.

16 Q. And consequently that you were of the opinion

17 that no such conspiracy had occurred?

18 A. Well I'm an economic expert, and --

19 MR. SCHWARTZBAUER: Object to the form;

20 assumes evidence not in evidence.

21 A. -- I think judges would get kind of upset if I

22 were to opine on whether a conspiracy exists. I can

23 only talk to what the evidence seems to suggest as to

24 whether there would be a conspiracy.

25 Q. Would it be fair to say that in those cases your

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1 opinion supported the conclusion that no such
2 conspiracy existed?

3 A. Yes.

4 Q. Now in the other one or two cases that made up
5 the three or four that you previously referenced, you
6 didn't testify or prepare a report, as I understand
7 it; is that correct?

8 A. Yes.

9 Q. Did those cases get resolved before it was
10 necessary for you to either prepare a report or
11 testify?

12 A. No, in some of the cases -- well, yes, I guess
13 in -- it was -- in some cases I wasn't going to be --
14 probably wasn't going to testify in any event, in
15 other cases they got resolved without me testifying.

16 Q. But in those other one or two cases where you
17 didn't testify or issue a report but in which you
18 studied this issue, did you also come to the
19 conclusion that the evidence was inconsistent with
20 the formation of a conspiracy?

21 A. Well my role wasn't quite the same. I didn't
22 get to the point of being a testifier in a case.
23 What I did do was look at evidence and what it showed
24 about whether it -- again whether it was consistent
25 or not with a conspiracy.

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1 Q. And as you looked at the evidence in those cases
2 were you doing so for the purpose of forming an
3 opinion as to whether the evidence was or was not
4 consistent with the formation of a conspiracy?

5 MR. SCHWARTZBAUER: Object to the form.

6 A. Well the purpose was -- that I was retained for
7 was to look at the evidence and see what it said on
8 that matter.

9 Q. And recognizing that that was your purpose, did
10 you reach an opinion in those cases about whether or
11 not the evidence was consistent or inconsistent with
12 the formation of a conspiracy?

13 MR. SCHWARTZBAUER: Object to the form.

14 A. I found that there was a lot of evidence that
15 was inconsistent with the -- that there had been a
16 conspiracy.

17 Q. In any of your litigation consulting roles have
18 you ever reached the opinion that the evidence that
19 you reviewed was consistent with the formation of a
20 conspiracy?

21 A. I have been retained on some matters where that
22 seemed to be probably true, but they didn't -- I'm
23 working on a matter like that now which is still at
24 an early enough stage that I haven't formed an
25 opinion. I've worked on others in which they -- the

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1 matter went away before I had come to a final
2 opinion.

3 Q. Okay. So as you sit here today, Dr. Scheffman,
4 in your litigation consulting work you've never
5 reached a final opinion that evidence that you have
6 reviewed was consistent with the formation of a
7 conspiracy; true?

8 MR. SCHWARTZBAUER: Object to the form.

9 A. Well that's a misleading question, counsel,
10 because I was with the FTC for a number of years and
11 you haven't asked about that; and two, --

12 Q. I was going to go into the FTC --

13 A. Okay.

14 Q. -- but that's why I was limiting the last few
15 questions to your litigation consulting. So just so
16 we have a clear record --

17 A. I think we said --

18 Q. -- let me ask it again so we clear up the
19 record.

20 With respect to your litigation consulting
21 experience, as you sit here today, Dr. Scheffman, you
22 have never reached a final opinion that evidence
23 you've reviewed was consistent with the formation of
24 a conspiracy; true?

25 A. Never reached a final conclusion. A final

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1 conclusion?

2 Q. Yes.

3 A. Well there's only two cases I reached a final
4 conclusion on that matter, and in those cases, yes, I
5 -- I concluded the evidence was inconsistent with a
6 conspiracy.

7 Q. And then this would be the third such case?

8 A. In which I've expressed an opinion in a final
9 report, yeah.

10 Q. All right. Now with respect to your experience
11 at the FTC, tell me what your role was in -- in
12 reviewing evidence regarding the existence of
13 horizontal conspiracies among competitors in
14 restraint of trade?

15 A. Well I was for a number of years the head --
16 essentially the head economist for antitrust matters
17 and head economist for part of that time with the
18 FTC. We were responsible for doing the economic
19 support work for all antitrust investigations at the
20 FTC.

21 Q. Approximately how many antitrust investigations
22 did you work on while you were with the FTC?

23 A. Hundreds, I suppose.

24 Q. Did you ever testify in trials?

25 A. Yes.

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1 Q. Approximately how many times?

2 A. Once.

3 Q. What was the issue that you were addressing at
4 that time?

5 A. Testimony on the address to some aspects of the
6 testimony of an economic expert.

7 Q. With respect to what issues?

8 A. The issue was what the statistical analysis put
9 forward by the expert showed.

10 Q. Did your testimony in that case have anything to
11 do with the existence of a horizontal conspiracy
12 among competitors in restraint of trade?

13 A. Sort of.

14 Q. How sort of?

15 A. Well, this was a -- it wasn't a -- it was the
16 FTC's facilitating practice case against the
17 producers of antiknock lead additives; it was
18 explicitly not brought as a collusion case, but as an
19 interdependent behavior perhaps collusive adoption of
20 facilitating practices.

21 Q. What was the interdependent behavior that you
22 were looking at?

23 A. I again was looking at -- my -- what I dealt
24 with was a statistical analysis by expert offered by
25 one of the respondents, the -- his opinion was that

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1 statistical analysis showed that the industry was not
2 engaging -- was not involved in interdependent
3 behavior. My conclusion was that his statistical
4 analysis showed the opposite, that there was -- that
5 the statistical analysis was valid, it would support
6 a conclusion that there was interdependent behavior.

7 Q. And what was the nature of the behavior that the
8 FTC believed was interdependent in this case?

9 A. Ologopolistic prices supported by adoption of
10 certain facilitating practices.

11 Q. What types of facilitative practices?

12 A. Advanced notice of price changes, most favored
13 customer clauses were the primary -- I think there's
14 one more. I can't forget -- I can't remember what
15 the other one was.

16 Q. So the FTC was looking at a horizontal price
17 maintenance scheme but wasn't specifically alleging
18 collusion; is that --

19 A. Yes.

20 Q. Because due to the facilitative practices, it
21 wasn't necessary to collude?

22 A. That was the theory of the case.

23 Q. How did that case conclude, be resolved? How
24 was that case resolved?

25 A. It was I think the ALJ found on favor of the

1 Commission's case. I think it was reversed by the
2 Second Circuit.

3 Q. Was any of the consulting work that you
4 performed during your years at FTC involved with
5 cases that were directed against tobacco companies?

6 A. It wasn't consulting work. I was a civil
7 service employee, but --

8 Q. Right.

9 A. Yes.

10 Q. Approximately how many?

11 A. I can think of -- what do you mean by a case? A
12 proceeding? You mean something that actually went to
13 litigation?

14 Q. Yes.

15 A. One.

16 Q. And what was the nature of that case?

17 A. It was an advertising case brought by the FTC
18 against RJR.

19 Q. Alleging what in connection with RJR's
20 advertising?

21 A. Alleging misleading -- if I remember right,
22 misleading advertising, that its advertising violated
23 Section 5.

24 Q. And what was it that was alleged to be
25 misleading about it?

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1 A. This was a case in which the challenge to
2 advertisements were R.J.R.'s what are called
3 advertorials --

4 Q. What are those?

5 A. -- which are -- advertorials are paid editorials
6 but clearly issued by R.J.R. saying -- commenting on
7 issues of public policy. These were having to do
8 with smoking and health controversy.

9 Q. Suggesting that there was indeed a controversy
10 as to whether smoking caused disease?

11 A. I don't remember what -- the -- the main --
12 main, if only, challenged advertorial dealt with --
13 the issue was R.J.R. was taking issue with the
14 medical community and the Surgeon General's
15 interpretation of scientific studies.

16 Q. For the purpose of alleging that the case had
17 not been proven that smoking caused disease?

18 MR. SCHWARTZBAUER: Objection; states facts
19 not in evidence.

20 Q. Is that your recollection?

21 A. No, I don't think the latter.

22 Q. How was R.J.R. in this advertorial referencing
23 the Surgeon General's reports?

24 A. I don't know for sure whether they referenced a
25 Surgeon General's report.

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1 Q. In one of your prior answers I believe you --

2 A. I --

3 Q. -- indicated that the advertorial addressed in
4 some manner the findings of the Surgeon General. Did
5 I hear you correctly?

6 A. But that -- that might be an implied -- that
7 might be an interpretation of what they were doing.
8 I don't know that the Surgeon General's -- I don't
9 remember whether the Surgeon General was even
10 mentioned explicitly in the advertorial.

11 Q. But the thrust of the advertorials was that the
12 case against smoking with respect to causing disease
13 had not been proved?

14 MR. SCHWARTZBAUER: Objection.

15 A. I answered that no. I think the trust of the
16 advertorials said that the scientific community has
17 used this particular study in support of the
18 conclusion that there's a connection with smoking and
19 heart disease and we, R.J.R., believe that's not the
20 proper interpretation of this study.

21 Q. And FTC believed that taking that position by
22 R.J.R. was misleading to the public?

23 MR. SCHWARTZBAUER: Objection to the form
24 of the question.

25 A. They challenged it under Section 5.

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1 Q. What essentially is your understanding of
2 Section 5?

3 A. Well I can't remember. I think it's -- yeah, I
4 can never keep track in part of Section 5 whether it
5 was false or misleading or deceptive or what the
6 specific claim was.

7 Q. But one of those?

8 A. Yes.

9 Q. One or more of those?

10 A. Yes.

11 Q. And what was your role in that case?

12 A. I was the head economist at the Commission at
13 that time, so I was responsible for supervising the
14 staff work and expressing my opinion of the
15 Commission.

16 Q. What did -- how did economics, your specialty,
17 come into play with respect to whether or not
18 R.J.R.'s ad was misleading or deceptive?

19 A. Well economists generally provide support work
20 on cases of that type with the FTC on analyzing
21 evidence and pulling -- you know, doing various
22 analyses of what -- what might be implied by a given
23 advertising claim. In this case the one essential
24 issue was what the report -- what the study that was
25 the subject of R.J.R.'s advertorial actually did say.

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1 Q. Did you testify in this case?

2 A. It wasn't a -- no. No, it was -- I was involved
3 in the Commission, proceeding of the Commission, and
4 decision as to whether to challenge the advertorial
5 or not.

6 Q. What was the Commission's decision?

7 A. The Commission decided to challenge under
8 Section 5.

9 Q. And what position were you taking at the
10 Commission level with regard to that issue?

11 A. Well, under Commission rules the Commission
12 takes a dim view of, and have a jealous view of, its
13 agency process, and its own view is that that's
14 privileged information as to what goes on within the
15 Commission.

16 Q. The -- did the Commission issue any sort of a
17 public document in connection with its investigation
18 such as an order or -- to show cause or --

19 A. Well it was lit -- no, the matter was litigated.

20 Q. And was it litigated before and administrative
21 law judge, before the Commission, or whom?

22 A. I think it was litigated in federal court on
23 first amendment issues or something.

24 Q. And your recollection is the case actually did
25 proceed to trial?

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1 A. I think there was a federal -- my recollection,
2 this is -- I think I was gone from the Commission by
3 this time -- was that there was a federal court
4 proceeding on the first amendment issue.

5 Q. What were the years of your tenure at the FTC
6 again?

7 A. I believe 79 to 88.

8 Q. Were you called as a witness in the case?

9 A. No.

10 Q. Do you know how the case wound up?

11 A. I think it was settled.

12 Q. Were you of the opinion that the R.J.R.
13 advertorial was deceptive and misleading?

14 A. Well it goes into Commission privilege.

15 Q. Well if the Commission went to trial on this
16 case, then assumedly its position was fully aired;
17 true?

18 A. No, that's an issue, why it takes a jealous view
19 of privilege because it doesn't want to be in a
20 situation of having its own employees testifying
21 against the Commission if that might happen, or
22 disclosing -- it wants to have a frank set of views
23 within the Commission because it does not want to be
24 in a position of then going into litigation and
25 having those frank set of views come back to bite it.

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1 Q. Your recollection is that this case went to
2 trial for some time before it was settled?

3 A. I don't know for how long.

4 Q. And did some Commission employees testify at the
5 trial before it was settled?

6 A. I think the trial was on first amendment issues
7 so I doubt it but --

8 Q. The trial was on the issue of whether or not
9 R.J.R. would be able to engage in misleading
10 advertising as long as it was within the first
11 amendment?

12 MR. SCHWARTZBAUER: Object to the form of
13 the question.

14 A. Well I -- I don't know what that means. My
15 recollection of what happened, and it was after I
16 left the Commission, is R.J.R. challenged the FTC's
17 authority to bring this action claiming first
18 amendment protection, I think they got that into
19 federal court, and I think the matter -- I don't know
20 whether there was a decision, there may have been a
21 decision, the matter went away. I mean it was never
22 fully litigated.

23 Q. So before R.J.R. initiated this federal court
24 action under the first amendment, apparently the FTC
25 had issued some sort of order, cease and desist

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1 order, or some type of order to R.J.R. with regard to
2 this practice of running these advertorials.

3 A. I don't know the details. It wouldn't have been
4 that. The FTC certainly wasn't saying you can't run
5 advertorials. There was specific advertorials which
6 the FTC was challenging.

7 Q. But as to those specific advertorials that the
8 FTC was challenging, what sanctions did the FTC
9 impose against R.J.R. relative to those advertorials?

10 MR. SCHWARTZBAUER: Object to the form.

11 A. Well it couldn't impose any sanctions until the
12 matter was resolved. I don't -- I don't know. I
13 don't remember.

14 Q. But there would first be a decision at the
15 Commission level with respect to the appropriateness
16 of those particular advertorials; true?

17 A. There would be a decision by the Commission to
18 litigate whether it was a violation of Section 5.
19 Remember the Commission is both the prosecutor and
20 the judge, so it would -- it determined to litigate
21 with R.J.R., that it had reason to believe that
22 R.J.R. violated Section 5.

23 Q. Well did R.J.R. appear before the Commission and
24 advocate its position before the Commission took that
25 position to go to court?

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1 A. R.J.R. was represented by counsel, I believe.

2 Q. At the Commission level. In proceedings before
3 the Commission?

4 A. It's not done -- no, it wasn't -- that would
5 happen when it would get to trial and it wouldn't be
6 -- it would be -- no, that would be far down the
7 road after. It doesn't work that way. They would
8 make representations to the potential prosecutors on
9 the merits, on their merits of the matter.

10 Q. So I take it then that there were actually two
11 potential lawsuits arising out of that investigation,
12 one by the FTC against R.J.R. and then the R.J.R.
13 first amendment lawsuit that you spoke about?

14 MR. SCHWARTZBAUER: Object to the form.

15 A. Again I am -- I'm not speaking with any
16 certainty because I was -- I was not the commissioner
17 any more, but that's, I believe, what happened.

18 Q. Now just so I'm clear on this, Dr. Scheffman, is
19 that the only matter during your ten years or so at
20 the FTC that you participated in in which the
21 Commission chose to take some action against the
22 cigarette companies?

23 MR. SCHWARTZBAUER: Object to the form.

24 A. Chose to issue a complaint.

25 Q. Yes.

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1 A. I think that's right.

2 Q. And the other matters that you participated in
3 that involved cigarette companies, were those all
4 situations where ultimately the Commission would have
5 to decide whether or not it was going to pursue
6 litigation against the tobacco companies?

7 MR. SCHWARTZBAUER: Can I have that
8 question read back.

9 (The record was read by the reporter.)

10 MR. SCHWARTZBAUER: Object to the form.

11 A. No, I think there are none of those, and I think
12 I may have misstated how many. In thinking about
13 what the Commission, and particularly what the
14 economists did, we did a lot of things with respect
15 to the tobacco industry at the Commission mostly done
16 by economists. Various studies were done, various
17 staff reports were done, that were published or were
18 submitted to the Commission, or issues dealing with
19 cigarette advertising dealing with the effects of
20 advertising on smoking.

21 Q. Submitted to the Commission for what purpose,
22 with respect to what potential action by the
23 Commission?

24 A. I remember we did a study on the effects of
25 advertising on smoking, that was because the

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1 Commission was interested in that, and I think the
2 Commission had to report to Congress on that issue.

3 Q. As to whether or not the advertising actually
4 promoted increased consumption of cigarettes?

5 A. Yes.

6 Q. And did you participate in that study?

7 A. That may have been conducted when I was the
8 bureau director, in which case I would have been the
9 ultimate supervisor of the study. I can't remember
10 when that -- there were some certain various studies
11 on the cigarette industry going on, I believe, when I
12 was -- and I was in a supervisory capacity over those
13 studies.

14 Q. And in addition to the study with regard to
15 whether advertising affected consumption, what other
16 studies did you participate with or supervise?

17 A. I think there was more than one study, and I
18 think that I was involved in some way in those
19 studies. I can't remember for sure. I think there
20 may have been at least two studies on the
21 relationship to smoking and cigarette consumption.

22 Q. Relationship between advertising to cigarette
23 consumption?

24 A. Yes, and maybe on the effects of advertising
25 restrictions on cigarette consumption, things like

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1 that.

2 Q. Any other studies that you supervised or
3 participated in the preparation of, involving the
4 cigarette industry?

5 A. Those are the only ones that I can recall right
6 now.

7 Q. And as you understood it though, the purpose of
8 the studies related to cigarette advertising was with
9 respect to making recommendations to Congress with
10 respect to legislation?

11 MR. SCHWARTZBAUER: Object to the form.

12 A. I don't -- I don't know. I believe, I don't
13 remember, that the FTC was requested by Congress to
14 tell us what you know about the relationship between
15 smoking and -- between advertising and smoking.

16 Q. And so the FTC prepared a written report that it
17 provided to Congress on that subject?

18 A. If my recollection is correct, that's what would
19 have happened.

20 Q. And you supervised the preparation of that
21 report?

22 A. Well, I was not the direct supervisor. I
23 believe some of those reports -- some of those
24 research was done when I was bureau director, so I
25 was the ultimate -- I was the ultimate supervisor but

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1 there'd be a layer of supervisors below me.

2 Q. In other words, were draft reports sent to your
3 desk for your review, editing, and approval?

4 A. It would depend. I would -- if it was under my
5 watch, I certainly would have kept abreast of what
6 was -- what was going on and would have certainly
7 approved the submission of the final report to the
8 Commission.

9 Q. What did those reports conclude with respect to
10 whether cigarette advertising affected consumption of
11 cigarettes?

12 A. One report dealt with the issue of does cig --
13 what is -- what is the primary effect of cigarette
14 advertising? Whether -- and there's been a lot of --
15 and mainly the report was pulling together the
16 publicly-available literature on that subject and the
17 publicly-available literature, the conclusion of the
18 report is that the -- if I recall right, the primary
19 overwhelming effect of cigarette advertising was to
20 -- effect was to switch smokers between brands.

21 Q. And none of it was to motivate individuals to
22 begin smoking?

23 MR. SCHWARTZBAUER: Object to the form.

24 A. This had to do with effects, what the effects of
25 advertising were, and there's been a lot of research

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1 on this issue. For example, you have -- in fact if I
2 recall right, in some countries where smoking --
3 where smoking advertising has been completely banned,
4 like Scandinavia if I remember right at some time,
5 smoking actually went up. A concern always within
6 the FTC and public health community is with regard to
7 this issue is should policy, with respect to
8 advertising, be changed, is that there's a public
9 health benefit of the advertising because it convey's
10 the Surgeon General's warning so you give up
11 something from public policy by banning advertising.
12 That's a concern within the FTC and the public health
13 community, and then there's been a lot of research by
14 economists and others that have looked across
15 countries and within countries at data to try and
16 figure out what the effect of advertising is on
17 smoking.

18 Q. And did you agree with the conclusion that the
19 effect of cigarette advertising had mainly to do with
20 promoting switching from one brand to another an
21 among existing smokers?

22 A. That was what the scientific literature on --
23 that has addressed that topic as far as we could tell
24 as economists at the FTC that that was the conclusion
25 of that scientific literature.

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1 Q. Are you aware that the cigarette industry has
2 always taken a similar position with regard to the
3 effect of its advertising?

4 A. They've -- I know that they have taken that
5 position, yes.

6 Q. Now are you familiar with the scientific
7 literature in the area of whether smoking causes
8 cancer, coronary diseases, and other health problems?

9 A. That technical scientific literature?

10 Q. Yes.

11 A. I'm familiar with the Surgeon General's
12 reports.

13 Q. Has it been your conclusion that smoking does
14 cause cancer and coronary disease?

15 MR. SCHWARTZBAUER: Object to the form and
16 the relevance of the question.

17 A. Well I think that cause is a -- depends what you
18 mean by "cause". I certainly would agree that anyone
19 who chooses to smoke is -- is taking a significant
20 risk, making -- taking a significant risk of
21 incurring health problems that they wouldn't
22 otherwise incur.

23 Q. Well if by "causation" is meant any chain of
24 events that leads finally to lung cancer or other
25 similar diseases with smoking as an indispensable

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1 link, based on that definition do you believe that
2 smoking causes lung cancer and these other diseases?

3 MR. SCHWARTZBAUER: Object to the form and
4 relevance.

5 MR. EISZNER: Object to the competence.

6 A. Well are you -- are you asking my opinion

7 or? --

8 Q. Yes, your opinion.

9 A. -- as an expert? I can't give you an expert
10 opinion.

11 Q. Your opinion as an individual then.

12 MR. SCHWARTZBAUER: Well same objection.

13 MR. EISZNER: Same objection.

14 A. Well I can only give a personal opinion. I'm
15 not an expert --

16 Q. What's your personal opinion, Doctor?

17 A. My personal opinion --

18 MR. SCHWARTZBAUER: Same objection.

19 A. -- is certainly some -- certainly some number of
20 people, the evidence would look like, who smoke will
21 experience health care problems to which the smoking
22 was -- was a significant contributor.

23 MR. GILL: Would you read that answer back
24 to me.

25 (The record was read by the reporter.).

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1 Q. So you personally believe that at least as to
2 some number of people who smoke, smoking would be an
3 indispensable link in some chain of events that would
4 lead to health problems?

5 MR. SCHWARTZBAUER: Object to form and
6 relevance.

7 Q. True?

8 A. Well I'd keep -- I'd answer it the same way I
9 did. I don't know what "indispensable link" means.
10 That's not jargon I would use.

11 Q. Contributing factor.

12 MR. SCHWARTZBAUER: Same objection.

13 A. Oh, yes, yeah.

14 MR. SCHWARTZBAUER: Off the record.

15 (Comments off the stenographic record.).

16 Q. Have you ever smoked yourself, Dr. Scheffman?

17 A. I have smoked cigarettes on occasion.

18 Q. Do you currently?

19 A. On occasion.

20 Q. And what does "on occasion" mean?

21 A. It means that sometimes if I go out for drinks
22 with somebody who else is smoking, I might
23 occasionally smoke a cigarette. That would be it.

24 Q. Do you buy the cigarettes yourself and have them
25 with you --

- 1 A. No.
- 2 Q. -- or do you bum one?
- 3 A. Bum one.
- 4 Q. All right. And on an annual basis then
- 5 approximately how many cigarettes do you smoke?
- 6 A. It depends who my social companions are, but you
- 7 know, not a lot.
- 8 Q. All right.
- 9 A. Probably we're talking about in numbers of packs
- 10 per year, you know, a --
- 11 Q. Approximate?
- 12 A. -- a small number, you know, very small number.
- 13 Q. Are you saying two or three packs per year?
- 14 A. I think probably that would be my his -- that
- 15 would probably be an overstatement of my average
- 16 consumption over the years.
- 17 Q. And has that consumption remained relatively
- 18 steady throughout your adult life?
- 19 A. No, it depends who my social companions are.
- 20 Q. Was there an earlier point in your life when you
- 21 were a heavier smoker?
- 22 A. Well when I was young -- when I was young I
- 23 tried to be a smoker for a while but it didn't do
- 24 anything for me, so there was a period when I was
- 25 maybe 18 or something like that that I smoked for a

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1 couple months, and there was a period where I smoked
2 a pipe for a while.

3 Q. Did you every -- in the last ten years have you
4 ever purchased a pack of cigarettes?

5 A. Yeah.

6 Q. In the last five years?

7 A. I may have occasionally -- I may have once or
8 twice, because of bumming cigarettes, been in a
9 position for social reasons to buy a pack, but, you
10 know.

11 Q. What brand do you purchase when you do buy some?

12 A. I -- I don't have any brand preference. I don't
13 -- I don't know.

14 Q. You just say Here's a few bucks, give me some
15 package of cigarettes?

16 A. Well I may be -- I may inquire as to preferences
17 of whoever I'm bumming it from, but I don't
18 remember.

19 MR. GILL: This is a good time for a break.

20 MR. SCHWARTZBAUER: Yeah.

21 (Recess from 10:03 to 10:08 a.m.)

22 BY MR. GILL:

23 Q. Dr. Scheffman, your written report in this case
24 was issued on July 1 of 1997. I take it that you've
25 reviewed it in preparation for your deposition today?

1 A. Yes.

2 Q. Are there any additional opinions that you've
3 formed between July 1, 97, and today that I won't
4 find in your report?

5 A. Well I think I noticed in my report that I
6 hadn't seen some other -- well one thing, I haven't
7 seen -- or hadn't seen some things as of July 1st.
8 Two, I indicated in my report that the Zeger, et al.
9 report which was commented on by Professor Jaffe that
10 I had not seen at the time of the report that I might
11 be prepared to offer opinions on that.

12 Q. And have you seen it now?

13 A. Yes.

14 Q. And what -- with respect to any of the new
15 things that you've seen since July 1 when you issued
16 this report, what new opinions have you performed as
17 a result or what modified opinions have you formed as
18 a result?

19 A. Well I'm prepared to offer testimony that it's
20 my opinion that the Zeger et al. report does not --
21 can't possibly be a measure of damages in this case
22 even under the Plaintiffs' theory that these are
23 damages.

24 Q. And what's the basis for that opinion?

25 A. That I -- I agree in broad outline with what

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1 Professor Jaffe said in his deposition, which was
2 that the -- and which Professor Viscusi said in his
3 report, if I recall, that in this sort of case
4 damages in an antitrust analysis would be based on a
5 but for analysis, which would have to be based on
6 what specific conduct had the defendant engaged in
7 that resulted in what specific activities at what
8 time and what were the effect of those activities in
9 the marketplace, and the Zeger report doesn't deal
10 with that at all.

11 Q. Is your opinion that the Zeger report is not
12 reliable with respect to a formulation of damages
13 based primarily on the view that the damages are not
14 specifically enough broken down to cause and event
15 situation?

16 MR. SCHWARTZBAUER: Object to the form.

17 A. No, my opinions don't deal with that.

18 Q. Why don't you amplify then again the basis for
19 your opinion with regard to the reliability of the
20 Zeger report. Perhaps I didn't understand.

21 A. Okay. As to the -- if -- if their report is
22 claiming to be a measure of what the damages alleged
23 to occur that would flow from the antitrust --
24 alleged antitrust violations here, they're on their
25 face not that, because the antitrust violation has

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1 got to be -- the damages arising from the antitrust
2 violation have to arise from the specific conduct, so
3 you have to have a theory, a model and evidence that
4 says that at such and such a point smoking would have
5 been lower or that safer products would have been on
6 the market, that people's health would have been
7 better, et cetera. That again is all assuming that
8 those damages have anything to do with antitrust at
9 all, which my conclusion is they don't.

10 Q. So you have a problem that the Zeger report
11 doesn't identify any specific conduct by agents of
12 tobacco companies that led to the damages that were
13 calculated?

14 MR. SCHWARTZBAUER: Object to the form.

15 Q. Is that a reasonable way to put it?

16 A. I don't think so.

17 Q. It sounded to me as though you were -- you were
18 addressing what you perceive as the absence of
19 specificity with respect to conduct by agents of the
20 Defendants that would have a cause and effect
21 relationship with health care costs in Minnesota. Is
22 there any aspect to your concerns about Zeger that
23 touch on what I just said?

24 A. I think so, but I don't know that I understand
25 what you just said, so --

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1 Q. As you understand the Zeger report, it attempts
2 to calculate increased health care costs in Minnesota
3 related to health care services provided to
4 individuals afflicted with disease caused by smoking;
5 is that true?

6 MR. SCHWARTZBAUER: Object to the form.

7 MR. EISZNER: Object.

8 A. I think so.

9 Q. And as far as you understand it, does the Zeger
10 report address the conduct of the Defendants that
11 produced the level of cigarette consumption in
12 Minnesota that caused these diseases?

13 MR. SCHWARTZBAUER: Object to the form.

14 A. Well gain, I'm not sure. I think no, but I'm
15 not fully sure that I understand your question.

16 Q. What parts of it are you unclear about? The
17 part about conduct by the Defendants?

18 A. Yes.

19 Q. Well if I understand what you're trying to tell
20 me, you're indicating that as far as you're
21 concerned, for a causal relationship to exist between
22 the alleged conspiracy on the one hand and the
23 increased health care costs in Minnesota on the
24 other, there must be some conduct that flowed from
25 the conspiracy that affected the health care costs in

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1 Minnesota; is that correct?

2 A. That's -- that's part of it, yeah.

3 Q. And you're saying that from the Zeger report
4 you're not sure what conduct that flowed from the
5 conspiracy would have had that effect?

6 MR. EISZNER: Object.

7 MR. SCHWARTZBAUER: Object to the form.

8 Q. Is that correct?

9 A. No.

10 Q. Are you satisfied that the Zeger report
11 references some conduct that allegedly flowed from
12 the conspiracy that would have impacted health care
13 costs in Minnesota?

14 MR. SCHWARTZBAUER: Object to the form.

15 A. I don't know about satisfied. The report
16 references the conduct. It's a report in connection
17 with this case.

18 Q. And what's -- what's -- what does the report
19 reference, as you understand it, with regard to that
20 conduct? What type of conduct does it reference?

21 A. Well I don't -- I don't remember the exact
22 language of the report. The report was mostly not
23 about conduct. The report is overwhelmingly about
24 trying to measure health care costs.

25 Q. But to the extent that you have any recollection

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1 of -- of the nature of the conduct that's referenced
2 as leading to the increased health care costs, what
3 is it?

4 A. We'd have to go back to the language. I don't
5 understand the reference. The report, the damage
6 analysis is independent of the conduct, is
7 independent of the conduct.

8 Q. And you're saying --

9 A. In the reference they could say, well, this is
10 in connection with this case, which in this case is
11 challenging certain alleged conduct, and this is or
12 damage analysis and the damage analysis is completely
13 independent from what conduct was alleged.

14 Q. And that's why you're critical of it because you
15 feel that it needs to be dependent rather than
16 independent?

17 A. I don't feel it needs to be. I think it has to
18 be to be a proper measure of -- of damages.

19 Q. And that's the principal criticism that you have
20 of the Zeger report with respect to causation?

21 MR. SCHWARTZBAUER: Object to the form.

22 A. It's more complicated than that because it's not
23 conduct. The damages get to what -- not just
24 conduct, but what would have been the effects of the
25 conduct. So a proper damage analysis would have said

1 this conduct led to this -- these effects that but
2 for the conduct would not have existed, and as a
3 result of this the health care costs were increased
4 by such and such.

5 Q. Okay. And you feel the Zeger report just
6 doesn't do that?

7 A. Yes.

8 Q. All right. Any other opinions that you've now
9 formed that aren't reflected in your July 1, 1997
10 report?

11 A. No.

12 Q. You are familiar with an economist by the name
13 of Joseph Schumpeter?

14 A. Yes.

15 Q. You're familiar with a doctrine that he has
16 formulated known as "Creative Destruction"?

17 A. Yes.

18 Q. Do you agree that creative destruction would be
19 the -- the engine that would principally drive
20 economic progress in our society?

21 A. Well I'd rather put it as innovation as clue to
22 the key driver of progress in our society, and
23 innovation in some cases destroys what already --
24 replaces what already exists.

25 Q. But the concept that the need to come up with

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1 new and superior products is the force that motivates
2 the creation of better products?

3 MR. SCHWARTZBAUER: Object to the form.

4 A. It's one of the forces.

5 Q. What would be the others?

6 A. I think the other forces are human beings are
7 curious people and that we're not satisfied so that
8 people and companies do things just because they want
9 to do something different, do something better.

10 Q. For the purpose of increasing sales and market
11 share?

12 A. I think that's a prime purpose but not the only
13 one.

14 Q. So you basically agree with Schumpeter's
15 analysis of economic -- of creative destruction?

16 MR. SCHWARTZBAUER: Object to the form.

17 A. I haven't looked at Schumpeter for over 30 years
18 so I don't -- I agree that innovation is in most
19 cases extremely important to competition.

20 Q. Now in this case are you going to be voicing any
21 opinions as to whether or not the conduct of the
22 Defendants in this case violates the Minnesota
23 Antitrust Act?

24 A. Conclusory?

25 Q. Yes.

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1 A. I -- I don't think the judge would let me do
2 that.

3 Q. You don't plan on doing that?

4 A. That's correct.

5 Q. But I take it that based upon your training and
6 your experience you've reached certain understandings
7 as to what you believe the purposes behind antitrust
8 laws are; is that true?

9 A. That's true.

10 Q. And viewing those purposes in a simplistic
11 fashion, would your understanding be that antitrust
12 laws basically seek to provide society with improved
13 products, superior products through the vehicle of
14 competition?

15 MR. SCHWARTZBAUER: Object to the form.

16 A. I wouldn't put it that way because the law
17 doesn't produce any products, improved or otherwise.
18 It would be that to try and ensure that markets and
19 competitors, companies don't engage in activities
20 which frustrate the fruits of a competitive process.

21 Q. Laws that have as their goal the attainment of
22 the full potential for competition to produce
23 superior products?

24 MR. SCHWARTZBAUER: Object to the form. If
25 that's a question.

1 Q. And services.

2 A. In a general sense, yes.

3 Q. And the improved products or services could be
4 in connection with either price or quality; true?

5 A. True.

6 Q. And one of the things that would improve the
7 quality of any product would be an enhancement of the
8 safety attributes that relate to that product; true?

9 MR. SCHWARTZBAUER: Object to the form.

10 A. Well, sort of in general, but no, not
11 necessarily. I mean some people -- there's not an
12 object -- there's not an objective standard for
13 products, it's what consumers desire. Sometimes they
14 desire things that are risky.

15 Q. But wouldn't you agree, Dr. Scheffman, that a
16 safer product, everything else being equal, is
17 certainly a better product, a better quality product?

18 A. That -- that's generally true, but just to
19 quibble, there are situations where people actually,
20 you know, want the risk. They don't want the risk
21 reduced, they actually like the risk.

22 Q. And setting aside products that are designed
23 specifically to appeal to people who wish to take
24 risk for whatever reason, as to the rest of the
25 products that consumers use, safer products would be

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1 better products?

2 A. Typically. Other things equal.

3 Q. And competitors in certain industries often
4 compete with respect to the safety of their products;
5 true?

6 A. True.

7 Q. Sometimes products are made better when
8 manufacturers issue warnings that pertain to
9 potential hazards involving the use of those
10 products; true?

11 MR. SCHWARTZBAUER: Object to the form.

12 A. Well as you describe it, I don't think that
13 makes the product any better; if I understood your
14 predicate, the product hasn't changed, so --

15 Q. Well the product itself hasn't changed with
16 respect to the way in which it is manufactured, other
17 than let's say to put a warning label on it, but the
18 use of the product is enhanced for the consumer if
19 the consumer has pertinent information regarding
20 potential hazards; true?

21 A. That can be beneficial.

22 Q. Everything else being equal with regard to any
23 given product, if a consumer fully understands the
24 potential hazards of using that product versus a lack
25 of understanding, the consumer is gaining the benefit

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1 of a better product if the consumer understands the
2 potential hazards; true?

3 MR. SCHWARTZBAUER: Object to the form.

4 A. Well I don't -- I think they're gaining the same
5 product first so they're not -- the product isn't any
6 better. In theory certainly a consumer, if they
7 understand better the nature of the product, might be
8 in a better position to make a decision whether to
9 consume it or how much to consume it. That's not the
10 same thing as -- it's -- that's not the same thing as
11 saying a specific warning label achieves that
12 objective.

13 Q. Well in some cases a specific warning label
14 would achieve such an objective; would it not?

15 A. It might. That's a -- that's a very tricky
16 issue actually, a warning label.

17 Q. Well and it would depend upon the adequacy of
18 the warning in order to make that subjective
19 determination in any given case; correct?

20 A. Well I would say adequacy is too simple a word.
21 I would say what -- what the warning label actually
22 communicates to people. And it can differ with
23 people and what it communicates can be quite
24 different from what it seems to read.

25 Q. Well that all goes into whether the warning is

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1 adequate?

2 A. As to whether the warning communicates

3 whatever --

4 Q. Ought to be communicated.

5 A. -- truthful information, truthful and useful

6 information to the consumer needs to be communicated.

7 Q. But assuming that a product contains a warning

8 that truthfully communicates in some understandable

9 way the potential hazards involved with the use of

10 the product, the value of that product to the

11 consumer has been enhanced; true?

12 MR. SCHWARTZBAUER: Object to the form.

13 A. Well there's -- there's all sorts of predicates

14 there, and the other -- another predicate is that

15 that is information that is -- that's something that

16 the consumer didn't already know.

17 Q. Yes, assuming the consumer didn't already know

18 the information?

19 A. And if it was information that was truthful and

20 was important to the consumer, if they fully

21 understand the situation, then that consumer would be

22 better off knowing the information.

23 Q. The product would then have an enhanced value

24 for that --

25 MR. SCHWARTZBAUER: Object.

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1 Q. -- consumer?

2 MR. SCHWARTZBAUER: Object to the form.

3 A. Well I don't know if it would get into
4 valuation, but the consumer would be in a better
5 position to make a decision.

6 Q. And approaching safety as an attribute of a
7 product that could have competitive consequences,
8 manufacturers might well determine that they would
9 gain a competitive advantage by truthfully informing
10 the users of their products about potential hazards
11 that exist with respect to the use of those products;
12 true?

13 A. That can be true.

14 Q. And in those situations the competitive
15 advantage that the manufacturer might seek could come
16 in a number of ways; true?

17 A. I don't know what you have in mind other than to
18 increase sales.

19 Q. Well certainly increased sales by providing a
20 better product, that would be one?

21 A. Well, again, I keep getting confused because.
22 If I understand, the product isn't any different.

23 Q. Well a product with enhanced value to the
24 consumer?

25 A. Well a product with a disclosure of information

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1 that's material to the consumer that's correct and
2 that they understand.

3 Q. And a product with enhanced value to a consumer
4 is a better product in that sense; is it not?

5 A. Well I don't -- that's a tautology I think.
6 That is, I'm saying that enhanced value, I didn't --
7 I did say that enhanced value would be a pretty
8 difficult concept to apply in practice so we -- but I
9 can agree that in theory a consumer having more
10 information that's truthful than is important to the
11 consumer might be beneficial to the consumer.

12 Q. At least it would be a more useful product to
13 the consumer; does that sounds fair?

14 A. I said it might be a better product to the
15 consumer.

16 Q. Okay. And if it were perceived by the consumer
17 as a better product for that reason, the manufacturer
18 who provided the warning would reap the benefit of
19 that consumer perception?

20 A. Well might reap the benefit of reduced sales.
21 The disclosure might tell some consumers -- lead some
22 consumers to make a decision, well, in light of this
23 information I don't think I want to buy your product.

24 Q. It could have that effect with respect to a
25 particular product, but it certainly, even in those

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1 situations, could enhance the reputation of that
2 manufacturer among consumers for integrity, et
3 cetera; true?

4 MR. SCHWARTZBAUER: Object to the form.

5 A. It could.

6 Q. And a policy of providing truthful, informative
7 warnings regarding potential hazards could also help
8 a manufacturer competitively by reducing its
9 litigation exposure; true, from products liability
10 suits?

11 A. I don't know. I'm not a products liability law
12 expert.

13 Q. Does that seem reasonable?

14 A. Well, as I say, that's not a -- it's -- it's --
15 I don't know.

16 Q. In none of your prior work as an economist, to
17 both in your academic teaching pursuits and through
18 your consulting work, you've never encountered
19 potential product liability concerns of
20 manufacturers?

21 A. I think I -- you know, I think I have done that,
22 but I don't think I -- I'm certainly not an expert on
23 whether disclosure of certain things gives you any
24 degree of immunity.

25 Q. All right. But I take it that from your prior

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1 experience you understand that an issue that often
2 arises in products liability lawsuits is whether or
3 not the manufacturer has adequately warned the
4 consumer with respect to the potential risks of using
5 that manufacturer's product?

6 A. My -- I don't remember. I haven't done any
7 products liability stuff for a while, so --

8 Q. Well, even in your capacity as a consumer
9 yourself who reads newspapers, are you aware that
10 issues of the adequacy of warnings arises in products
11 liability lawsuits?

12 A. Well I've read -- I've read public literature
13 and newspapers where people opined that warning
14 labels on cigarettes have -- have helped the
15 cigarette companies defend, but I don't -- I don't
16 know what that means as a matter of law. As far as I
17 know it didn't -- the warning labels haven't
18 typically kept the cases from getting to juries, and
19 so the issue is usually what does a jury consider
20 important in the overall evidence, and that may be
21 important or not, how would you know?

22 Q. All right. But understand that one of the
23 issues that might arise in a products liability case
24 is whether or not the manufacturer adequately warned
25 the consumer regarding potential hazards relating to

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1 the use of that product?

2 A. Well I think you asked that, and I said I can't

3 -- I have -- I have thought about that in the past,

4 more when I was involved in products liability, it

5 sounds right, but I can't today tell you and

6 certainly can't tell you as an expert whether that's

7 true.

8 Q. All right. But do you understand as someone who

9 -- who reads the newspapers, watches the news on

10 television from time to time that results in products

11 liability lawsuits can often involve 7 or 8 figure

12 numbers?

13 A. Yes.

14 MR. SCHWARTZBAUER: Object to the form.

15 Q. And a manufacturer who's in a position to assert

16 that it provided the consumer with an adequate

17 warning regarding the potential hazards of using the

18 manufacturer's product would be in a better position

19 to defend on that issue than some manufacturer who

20 provided no warnings at all; true?

21 MR. SCHWARTZBAUER: Object --

22 A. I don't have any --

23 MR. SCHWARTZBAUER: Object to the relevance

24 and competence.

25 A. I told you I can't answer that question.

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1 Q. You're not --

2 A. I'm not an expert on that. I have no more -- I
3 certainly wouldn't as a matter of law know that's
4 true. I've had various times I've looked at the
5 economics of tort and contract law and have thought
6 about, you know, duties of disclosure and things, but
7 I don't remember. I haven't thought about that for a
8 while.

9 Q. Well even with respect to the work you've done
10 on duty of disclosure I take it you reached the
11 conclusion that there are -- there well may be legal
12 consequences involved in not disclosing potential
13 hazards?

14 MR. SCHWARTZBAUER: Object to the form.

15 Q. True?

16 A. I can't -- I can't opine on that. I'm not an
17 expert. I certainly from reading the press know that
18 people will bring suits based on that being part of
19 the theory. You can bring suits under lots of
20 theories, so is that important or not? I really
21 don't know.

22 Q. But simply in terms of a manufacturer in a
23 products liability suit attempting to defend itself,
24 to the extent that a given manufacturer can assert
25 that it has provided full and complete warnings

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1 regarding potential hazards, that manufacturer is
2 going to be better off than a competitor who with a
3 very similar product provided no warnings at all;
4 does that seem fair?

5 MR. SCHWARTZBAUER: Objection.

6 A. Well, see, I'm not an expert on this and I don't
7 really know. That's really an empirical issue, which
8 is could we -- if we do like Rand does, these large
9 scale studies of litigation, we could -- I don't know
10 whether someone studied whether or not that in fact
11 is true or not, I don't know.

12 Q. All right. So you're not able to address that
13 issue is what you're telling me?

14 A. To -- to opine on those conclusions -- those
15 statements, that's correct.

16 Q. All right. I want you to assume hypothetically
17 then that a manufacturer who has given full and
18 complete warnings regarding potential hazards would
19 indeed be in a better position to defend product
20 liability lawsuits than a competitor who has not
21 provided such warnings. All right.

22 A. Hypothetically, yes.

23 Q. All right. Now if the hypothetical is true,
24 then that would be another competitive advantage that
25 might be gained through the provision of complete and

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1 adequate warnings regarding product hazards; correct?

2 MR. SCHWARTZBAUER: Object to the form.

3 A. I don't see that's a competitive advantage. By
4 you're hypothetical, by assumption would reduce --
5 they would perceive reduced risk of paying money in
6 product liability suits.

7 Q. And if it actually worked out that they did pay
8 substantially less money in product liability
9 lawsuits than their competitors, that would be a
10 competitive advantage that they could put to use in
11 any number of ways; true?

12 A. I'm not -- I don't see what this has to do with
13 competitive advantage. Their shareholders or whoever
14 owned the firm or whoever, the employees, someone
15 would make -- on your hypothetical would have more
16 money than they otherwise would have had.

17 Q. Or they could take --

18 A. Under your, well --

19 Q. Yeah. .

20 A. Other things -- wait a minute. Let me see where
21 we are going with this. That's -- no, okay. Now
22 that I understand, if I thought about the question.
23 Because these questions are always more complicated,
24 of course, because it may have been that the
25 competitor that didn't do this has increased

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1 liability costs, but is hurt less in the marketplace
2 and so is more profitable.

3 Q. So there may be other countervailing
4 considerations, but simply with regard to litigation
5 exposure in terms of that being a cost of doing
6 business, the competitor who is able to escape
7 liability through the provision of full and adequate
8 warnings regarding product hazards would be better
9 off competitively in that area than competitors who
10 didn't have that type of protection; true?

11 MR. SCHWARTZBAUER: Object to the form.

12 A. I just don't see what that has to do with better
13 off competitively. I think you -- by your assumption
14 they would have less expected litigation costs. I
15 agree that's true.

16 Q. And if they have substantially less litigation
17 costs, that would produce greater profit, everything
18 else being equal; true?

19 A. True.

20 Q. And with the greater profit, everything else
21 being equal, the company who enjoyed that competitive
22 advantage could either take those profits and give it
23 to -- give them to the shareholders or plow the
24 profits back into the business, or some combination
25 of the two; correct?

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1 MR. SCHWARTZBAUER: Object to the form.

2 A. Under the hypothetical that they have more money
3 for whatever reason than they otherwise would have,
4 yeah, then they have more money and then they could
5 do different things with it and they would be in a
6 different situation than a company that had less
7 money.

8 Q. So assuming that the company that did not
9 provide warnings didn't reap a greater market share
10 on sales simply because they didn't provide any
11 warnings, the company that had provided the warnings
12 would wind up with greater profits to utilize however
13 management saw fit?

14 A. Well, no, --

15 MR. SCHWARTZBAUER: Object to the form.

16 A. -- I don't think it has to do with market
17 share. What you have to do is you have to make this
18 a total tautology which is that the other company
19 doesn't make more money than the company, so you got
20 one company with the warning, one that doesn't, and
21 the one that with the warning, by your hypothetical,
22 has less litigation risks, then you would have to say
23 by your hypothetical that the one who didn't have the
24 warning in fact doesn't make enough extra profit from
25 that strategy that it has less money, and then it's a

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1 tautology that yes, under that assumption, they have
2 less money.

3 Q. And sticking with this hypothetical, the company
4 without any warnings you suggested might well enjoy
5 greater sales because --

6 A. I --

7 Q. -- of -- of the lack of concern by consumers
8 with respect to using their product or lack of
9 understanding on the part of the consumers as to the
10 potential hazards; is that what you were saying?

11 MR. SCHWARTZBAUER: Object to the form.

12 A. No.

13 Q. Tell us that part to me again.

14 A. Well one thing, you had two things there, said
15 would be likely to, and I didn't make any statement
16 on that, and then --

17 Q. You just said "may".

18 A. May. And second, you made certain specific
19 assumptions about what the lack of warning labels
20 meant, and it could be a whole lot of things that
21 could be the reason why not having the warning label
22 led to your higher profitability.

23 Q. Yes, but the one that we've been talking about
24 was reduced litigation exposure which would translate
25 to reduced expenses and greater profits; correct?

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1 A. That they could have higher profits.

2 Q. Okay. And just as it's possible that the
3 company that didn't warn might enjoy greater sales
4 competitively due the lack of a warning, it's also
5 very possible that the company that didn't warn would
6 be perceived as unreliable in the marketplace and
7 would as a consequence enjoy less sales; true?

8 A. That's possible.

9 Q. So in -- in that scenario, the company that
10 warned would enjoy not only the increased
11 profitability due to lesser litigation expenses but
12 some expansion of market share at the expense of
13 competitors who are deemed to be unreliable by
14 consumers?

15 MR. SCHWARTZBAUER: Object to the form.

16 MR. EISZNER: Object to the form.

17 Q. True?

18 A. By your assumption. I mean I can't say it's
19 true. You've assumed that, so I guess --

20 Q. But what I've assumed is just as likely or
21 perhaps even more likely than what you assumed
22 regarding the effect of not warning; true?

23 A. I didn't make any assumption on that.

24 MR. SCHWARTZBAUER: Object to the form.

25 A. I didn't make any assumption. What I said is

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1 it's just a lot more complicated than that.

2 Q. But -- but generally, I take it, as an economist
3 you would agree that being perceived by consumers as
4 a trustworthy and reliable manufacturer is a
5 competitive advantage for that manufacturer?

6 A. Well that -- that's something distinct from
7 warning labels, but I would agree having a better
8 reputation, other things equal, is a competitive
9 advantage.

10 Q. And one way to enhance a manufacturer's
11 reputation in terms of reliability and integrity
12 would be to gain a reputation for providing full and
13 adequate warnings regarding potential hazards
14 involved in using that manufacturer's products; true,
15 that would be one way?

16 A. In theory. It's very, very tricky what -- what
17 that means in practice. There's been a lot of
18 literature exactly on that.

19 Q. Now back in 1953 the cigarette manufacturers
20 were faced with some information that had been
21 publicly disclosed which was potentially damaging to
22 their sales; true?

23 A. True. Not the first time, but that was a major
24 event around that time.

25 Q. Prior to 1953, as you understand it, there had

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1 certainly been concerns expressed from time to time
2 as to the consequences to health of smoking; true?

3 A. Quite a lot of them, yeah.

4 Q. But in 1953 there were some scientific studies
5 that were released that appeared to give considerable
6 credence to some of the rumors or claims that had
7 been previously disseminated; true?

8 A. No, I'm saying 1953, and it was actually earlier
9 than that, the first studies that -- during that time
10 that had a big impact were the statistical studies by
11 Doll, I think, and that wasn't the first, that wasn't
12 the first statistical study, it wasn't the first --
13 Wynder, et al. study was not the first scientific
14 non-statistical study relating to smoking and health,
15 but those were big events at that time, certainly
16 those two studies at that time.

17 Q. And Hammond also had an epidemiological study in
18 53; did he not?

19 A. I don't remember.

20 Q. Would you agree though that certainly concerns
21 about the safety of smoking cigarettes were
22 dramatically heightened as a result of studies that
23 were released in or around 1953?

24 A. As a result of the publicity that was created by
25 those studies, yes, as best we can tell it had a

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1 significant effect on the public.

2 Q. Sure. If nobody knew about the potentially
3 damaging information it wouldn't have a significant
4 potential to impact sales, but the fact that these
5 studies in 53 were widely publicized underscored the
6 potential that they had to affect cigarette sales?

7 MR. SCHWARTZBAUER: Object to the form.

8 Q. True?

9 A. I would say that they -- the public -- the
10 publication of -- the publicity about the studies as
11 best we can tell had a significant effect on
12 cigarette sales.

13 Q. And that publicity would have heightened the
14 potential competitive advantages that producing a
15 cigarette perceived to be safe would have had for the
16 manufacturers of cigarettes at that time; true?

17 MR. SCHWARTZBAUER: Object to the form.

18 A. At that very time?

19 Q. Yes.

20 A. Not so clear. I think that the reason is that
21 -- and there have been a lot of studies like that;
22 that is, in -- for example, in the Alar apple thing,
23 and it's common, when the scare arose, everything,
24 all apple sales went down, non-Alar apples and Alar
25 apples went down.

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1 Q. And it's your understanding that some sales went
2 down of cigarettes in 1953,?

3 A. Studies have indicated, yes, a significant
4 percentage, yes.

5 Q. And it would have been reasonable for the
6 manufacturers of the cigarettes to attribute those
7 dips in sales to safety concerns?

8 A. I imagine.

9 Q. Now in that situation the manufacturers of
10 cigarettes would have had a collective incentive to
11 want the whole issue to go away; correct?

12 A. Correct.

13 Q. But they would have had, each of them, an
14 individual incentive to try to exploit the issue to
15 their company's benefit; true?

16 A. No, I think the issue is not -- I think the
17 climate is -- is probably less exploitable than prior
18 to the climate.

19 Q. What's the basis for that opinion?

20 A. Because this sort of adverse information damages
21 the whole industry. Now I agree if you could somehow
22 easily convince people you've got this cigarette
23 that's absolutely safe, it sounds like people -- that
24 that would be a benefit, but in fact what we know is
25 that the apple -- sales of all apples, including

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1 non-Alar apples, as far as I recall, went down
2 because you create this big controversy in people's
3 minds and they can always decide I'm not going to buy
4 this, why do I -- why do I want this problem? You
5 tell me that this is okay, but how do I know? So I'm
6 not going to buy it, I don't want this product. It's
7 not a fertile climate for --

8 Q. But there's a significant difference between the
9 consumer need for apples and consumers' need for
10 cigarettes; correct?

11 MR. SCHWARTZBAUER: Object to the form.

12 A. For a lot of consumers, yes.

13 Q. No one's ever suggested that anybody was
14 addicted to eating apples?

15 A. I don't -- I don't know of such a claim.

16 Q. But you've certainly heard claims that smokers
17 are addicted to smoking due to the nicotine in the
18 cigarettes?

19 A. I've heard those claims.

20 Q. And is it your view that those claims are valid?

21 MR. SCHWARTZBAUER: Object to the form,
22 irrelevant.

23 MR. EISZNER: Competence.

24 A. Addiction is -- is a scientific term and so I --
25 from personal experience, as all of us know that

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1 there are people that seemingly have a lot of
2 difficulty quitting smoking.

3 Q. So for people who would have a lot of difficulty
4 quitting smoking, the availability of a safe
5 cigarette would be something that would convey a
6 tremendous competitive advantage on the manufacturer
7 who could generate it; true?

8 MR. SCHWARTZBAUER: Object to the form.

9 A. You need a lot -- unfortunately you -- as we
10 know from the experience of the industry, you need a
11 lot more than that.

12 Q. But that would be a significant difference
13 between the comparison to the apple industry in the
14 face of the Alar scare; true?

15 A. That's an empirical issue. I don't know. I may
16 have looked -- it would be interesting to look at how
17 much apple consumption went down. It was estimated
18 that cigarette consumption fell by 4 to 6 percent,
19 so. But, for example, with Alar, I understand your
20 argument, I don't have a problem with the fact that
21 people are hab -- a lot of people are habituated to
22 smoke that maybe the effect would be bigger, but if
23 we looked at data, then we'd find that the effect on
24 apples or something is about the same order of
25 magnitude.

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1 Q. But the more habituated or addicted smokers
2 might have been in 1953-1954, the more motivation
3 they would have needed to quit; correct?

4 MR. SCHWARTZBAUER: Object to the form.

5 Q. Or even reduce consumption?

6 MR. EISZNER: Objection; compound.

7 A. I think that's a reasonable assumption.

8 Q. And given that situation and assuming that the
9 cigarette manufacturers understood that their
10 customers were habituated or addicted to smoking due
11 to the nicotine, the highly-publicized information
12 regarding causal link between smoking and disease
13 would have provided the individual manufacturers with
14 a strong incentive to come up with a cigarette that
15 would not be linked to disease; true?

16 MR. SCHWARTZBAUER: Object to the form.

17 A. I think the industry as a whole and the
18 individual competitors all had a strong incentive of
19 doing whatever they could to make this problem go
20 away, and the only way it turned out to make the
21 problem go away was whether you could find out what
22 was the problem. And we to this day don't know the
23 answer to that.

24 Q. But in virtually all industries there is a
25 collective desire to avoid competition but an

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1 individual desire to exploit it to that company's
2 benefit; true?

3 MR. SCHWARTZBAUER: Objection.

4 A. No, I don't agree.

5 Q. Which part don't you agree with?

6 A. I don't agree that it's a fact that in all
7 industries the industry perceives as a benefit not to
8 have competition. I agree that that's a theory
9 that's true in a lot of circumstances, but it's --
10 it's not true as a matter of fact in every industry.
11 In some industries the competitors rightfully
12 understand that the competition is really a benefit
13 to everybody, to them.

14 Q. Well the cigarette industry in 1953 and 1954 was
15 certainly an industry that collectively wished to
16 avoid the smoking/health issue if it could; true?

17 A. Well I can't speak to their wishes. I can speak
18 to the actions of the industry.

19 Q. Well based upon the -- the events that you're
20 aware of, it would be logical to assume that the
21 cigarette industry as a whole in 1953-1954 would have
22 preferred that the smoking/health issue simply
23 disappear?

24 A. Never existed, sure.

25 Q. But given the fact that the issue had appeared

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1 and had been well publicized in 1953, absent any
2 collusive agreements, each of the individual members
3 of the cigarette industry would have had some
4 incentive to try to gain commercial advantage due to
5 the safety issue?

6 MR. SCHWARTZBAUER: Object to the form.

7 Q. True?

8 A. I think that that's a -- I don't know if you've
9 ever had clients, counsel, that have had -- in that
10 situation. I don't think any company would think
11 it's an advantage, that has a commercial advantage,
12 the issue there is just damage control. It's not an
13 opportunity to be seized, it's a -- even if you don't
14 have the problem, in the case of Alar, it's a serious
15 problem that you're trying to deal with as best you
16 can. I don't think taking commercial advantage is
17 not what anyone would perceive as being their
18 business situation at that point; it would be, you
19 know, damage control, and how to deal with the --
20 with the environment as it exists.

21 Q. But with respect to a population of smokers in
22 the tens of millions in the early 50s that was
23 habituated or addicted to smoking cigarettes, the
24 ability to produce a cigarette that could be verified
25 as being safer than those of a company's competitors

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1 would have conferred a very significant advantage on
2 the innovative company with respect to market share;
3 true?

4 MR. SCHWARTZBAUER: Object to the form.

5 MR. EISZNER: Objection, foundation.

6 A. No, you'd have to make some other assumptions.

7 Q. Well if -- and one of the opinions that you've
8 reached during your career is that the effect of
9 cigarette advertising has -- is directed mostly to
10 causing smokers to switch brands; correct?

11 A. I didn't -- that wasn't an opinion about what it
12 was directed at as to what the effect was.

13 Q. But if the effect of advertising is to
14 accomplish switching between brands, certainly a
15 company that could advertise that it had developed a
16 cigarette that would not cause cancer or other
17 diseases and could back up such a claim, that company
18 would be in position to affect significant,
19 substantial switching in the market; correct?

20 A. Not necessarily.

21 Q. What limitations would you see in accomplishing
22 that objective, assuming that one company was able to
23 make those claims?

24 A. It would be that they produced a product that
25 people actually wanted to buy -- wanted to consume.

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1 That was -- that would be the most critical or
2 important, and then the issue is just because you
3 advertise something doesn't mean you convince anyone
4 it's true.

5 Q. All right.

6 A. And I think you would have, in that climate, the
7 advertising, I think you would have made -- if you
8 had very positive publicity from the medical
9 community and support from the medical community and
10 the government saying these guys aren't just claiming
11 it, it's actually true, you should believe it, and
12 they delivered a product that people thought was an
13 acceptable alternative to what they were smoking,
14 yeah, you could have done very well.

15 Q. Okay. All right. And acceptable alternative
16 refers to the fact that you've got to come up with a
17 product that is not only safe but which somebody
18 actually wants to smoke?

19 A. Right.

20 Q. You're not expecting people are going to put
21 something in their mouth that's on fire just for the
22 heck of it.

23 A. I agree with your former statement that it's got
24 to be a product that they choose instead of the other
25 products that are on the marketplace or instead of

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1 consuming none.

2 Q. And then they'd have to be able to back up in
3 some reliable way their claim that they had actually
4 produced a cigarette that wouldn't produce cancer and
5 these other diseases that had been linked to smoking?

6 A. And I think to have a significant effect,
7 convince the medical community, leaders of the
8 medical community and government officials that this
9 was right.

10 Q. Well the goal would be to convince smokers;
11 correct, because the smokers are going to buy the
12 product?

13 A. Right, and I'm saying the vehicle for the -- the
14 vehicle for persuasion, and that's clear from the
15 industry that, you know, the big -- the big decision
16 makers or the big influences of decision for
17 consumers have been the Surgeon General, government
18 pronouncements, Readers Digest, you know, independent
19 authorities, especially on health issues.

20 Q. Well independent authorities, history has shown,
21 have certainly had an influence on consumption of
22 cigarettes is what you're saying?

23 A. I'm saying they're certainly the single largest
24 impact.

25 Q. But if the Surgeon General had substantial

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1 impact on the consumption of cigarettes, there'd be
2 hardly any today; true?

3 A. Correct.

4 Q. I mean if everybody was taking what the Surgeon
5 General said, nobody would be smoking?

6 A. But this is something -- this is -- this is
7 going the other direction.

8 Q. And -- but you're saying certainly if a company
9 that claimed to have produced a safe cigarette not
10 only could support that claim with seemingly reliable
11 evidence, but could in addition gain the endorsement
12 of the government or other health agencies, that
13 would simply be additional incentive for smokers to
14 switch to that brand?

15 A. I think there would have to be endorsements.
16 What would -- if the company said, well, we believe
17 that this thing doesn't cause cancer because we've
18 studied it, you know, you'd have to get -- why would
19 anyone believe that. You might get some, but you'd
20 have to get some publicity that suggested some
21 third-party people with some credibility or something
22 or objectivity that agreed with that.

23 Q. Recognizing that third-party endorsement would
24 definitely help, nevertheless in theory if the
25 company itself came up with evidence that was deemed

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1 to be reliable by smokers to cause massive switching
2 to that company's brand, that would be enough; would
3 it not?

4 MR. SCHWARTZBAUER: Object to the form.

5 A. Well I can't say for sure, but I think that
6 would be what would be required. I'd say yeah, that
7 sounds like a good proposition, a good potential
8 investment.

9 Q. And certainly the more reliable the evidence in
10 support of a claim of a safer cigarette, the more
11 likely it is that the government and public health
12 sources will endorse the claim; true?

13 A. Well I don't think it's -- they're not going to
14 endorse a claim unless it's reliable. You know, it's
15 given and it's got to be reliable. The question is
16 what is it? Reliability doesn't mean much in its, it
17 just means it's an objectively-conducted study under
18 scientific -- proper scientific methodology, so it's
19 not reliability, it's got to be -- it's got to move
20 the needle in a big way.

21 Q. All right. But the more reliable that type of
22 objective scientific evidence in support of the
23 claim, the more likely it is that the government will
24 agree and that public health organizations will agree
25 with the claims and endorse the claims; true?

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1 A. Yeah; true, given that reliability is kind of a
2 vague statement, vague concept. The more mountain of
3 credible evidence there is that confirms the
4 proposition.

5 Q. Now did Mr. Schwartzbauer provide you with a
6 number of documents that the State of Minnesota and
7 Blue Cross Blue Shield pre-designated in connection
8 with your deposition --

9 A. Yes.

10 Q. -- sometime during the last week?

11 A. Yes.

12 Q. Did you review those documents?

13 A. Yes.

14 Q. Do you recall that among those documents you
15 would have read certain internal cigarette company
16 documents that addressed the substantial competitive
17 advantage that would be conferred upon a company if
18 it developed a cigarette that did not produce tumors
19 on the skins of mice or other potential health
20 problems?

21 MR. SCHWARTZBAUER: Object to the form.

22 A. No, I don't -- I mean I think there's some
23 things you could interpret that way. Certainly a
24 number of Wakeham memos might be interpreted that
25 way. In the documents they gave me the only explicit

1 statement on that that I saw was I think a Philip
2 Morris document saying that that claim, say, for
3 example, doesn't produce tumors on mice isn't -- you
4 can't do anything with it at all, it's not -- not
5 anything you can do with it, and that's absolutely
6 right, almost assuredly, that you wouldn't be able to
7 do anything with that even if you had that objective
8 evidence.

9 Q. And it wouldn't be enough?

10 A. It wouldn't be enough to allow you under the FTC
11 provision of implied claims to make any significant
12 claims with respect to that. The problem is it -- it
13 doesn't prove anything.

14 Q. Well do you recall in reviewing any of the
15 documents that the State of Minnesota and Blue Cross
16 Blue Shield pre-designated any suggestions that
17 developing a safer cigarette would confer a huge
18 competitive advantage on the company that did so, a
19 cigarette that did not cause disease?

20 A. Well I think -- I don't remember very many
21 documents that specifically say that, but I don't
22 think there's any doubt that everyone realized that
23 if someone could come up with a thing like that they
24 might get a lot of sales.

25 Q. All right. So you would agree that each of the

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1 cigarette manufacturers as of 1953 would have had a
2 significant individual incentive to develop a
3 cigarette that could be reliably advertised as not
4 producing any ill health effects?

5 MR. EISZNER: Object to the form.

6 MR. SCHWARTZBAUER: Objection.

7 MR. EISZNER: Object to the foundation.

8 A. I think all the companies acted -- that their
9 actions indicated that that's -- that that was their
10 belief.

11 Q. And that would be a logical belief to have under
12 the circumstances that existed in the wake of the
13 adverse medical studies that were issued in 1953;
14 true?

15 A. No, I'm saying that's what their actions
16 indicated. I mean if you look at in theory what
17 companies in that situation might have thought, they
18 might have thought, well, one, our litigation
19 exposure might be increased by this, maybe if we
20 cannibalize our existing sales, and maybe -- maybe
21 someone else will do the same thing, and so maybe we
22 wouldn't get any more sales at all, the sorts of
23 things that companies in any industry think about
24 when they're coming out with new products that they
25 may cannibalize their own sales, but as to their

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1 actions, they certainly all engaged in actions, but
2 certainly not -- not with the same vigor, not -- at
3 different times. The history of the industry is the
4 ones that -- to some extent the ones that pursued it
5 with the biggest vigor and pulled it off were the
6 successful companies, but -- in the end.

7 Q. But, Dr. Scheffman, are you suggesting that it
8 would have been reasonable in 1953-54 for a cigarette
9 company to have come to the conclusion that even if
10 we had a cigarette that we could reliably advertise
11 as being safe, it might not be worth the effort
12 because all it might do is cannibalize our own sales?

13 MR. SCHWARTZBAUER: Objection.

14 A. It might do worse than that. Maybe it won't
15 sell any and, you know, it would just further
16 increase our problems. But it could have been that
17 concern.

18 Q. Well if it were a cigarette that were
19 commercially acceptable in terms of -- of consumer
20 satisfaction and it carried a clean slate on the
21 health issue, are you suggesting that the cigarette
22 companies may have thought that even with that the
23 brand might not do very well?

24 A. Well you sort of assume, I guess by your
25 assumption, they would do well. If you're assuming

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1 they would do well, then I would agree -- I mean I
2 would agree that I would expect that if that was
3 their expectations that they would be -- they would
4 pursue that opportunity.

5 Q. If they could come up with a brand of cigarette
6 that was commercially acceptable and which had
7 dramatic perceived health benefits, it would be
8 reasonable to assume that that brand would gain
9 significant market share; true?

10 MR. SCHWARTZBAUER: Objection.

11 A. Well I think you're -- your assumption's really
12 a tautology, right, commercial acceptance and if you
13 put on that and then people buy it, if that's what
14 you mean, a lot of them buy it, it's a tautology.

15 Q. Well commercial acceptance from the standpoint
16 that it's a reasonable substitute from the standpoint
17 of satisfaction --

18 A. But I don't know --

19 Q. -- with other cigarettes that are on the market?

20 A. I mean I think we can't get there with simply
21 the tautology, which is a lot of people buy it.

22 Q. Well if you've got a cigarette that is going to
23 have reasonable appeal to smokers in terms of their
24 satisfaction with the -- with the act of smoking and
25 will be perceived by smokers as safe to smoke, the

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1 combination of those two factors is going to produce
2 sales; is it not?

3 A. I think it's a good proposition, but I don't
4 think it's a certainty. It's a tricky issue. Volvo
5 is objectively safer than a number of cars on the
6 road and has a very small market share relative to
7 some other cars that objectively are not as safe in
8 human head-on collisions. So it's -- you know, you
9 never know for sure what people are going to do, but
10 it certainly -- it's the -- the proposition you're
11 talking about I would invest in it if I knew exactly
12 what the product was and I convinced myself that,
13 yeah, people really like this and we can convince
14 them that it's safer, it sounds like a good bet to
15 me.

16 Q. And in the car industry though there aren't any
17 particular models that are perceived to be as
18 hazardous to use as cigarettes, are there?

19 MR. SCHWARTZBAUER: Object to foundation.

20 A. I don't know what -- I don't know the research
21 on people's perceptions of risk of automobiles versus
22 cigarettes.

23 Q. But assuming that --

24 A. The difference is people have to use -- people
25 virtually have to use automobiles, so.

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1 Q. Assuming that a commercially-acceptable new
2 cigarette were put on the market with supportable
3 safety claims, it's highly loyal that such a
4 cigarette would gain significant market share; true?

5 A. I think it's right, but I think it's -- the
6 health claim, I think the key thing to the health
7 claim is to what extent the important opinion makers,
8 the health community and the government, what -- what
9 position they take on it.

10 Q. And the likelihood of such a new cigarette brand
11 gaining a significant market share would be enhanced
12 if smokers as a group tend to be habituated or
13 addictive -- addicted to smoking cigarettes; correct?

14 MR. SCHWARTZBAUER: Objection.

15 A. I'm not sure I understand. I think the answer
16 is no.

17 Q. Well if smokers are -- are habituated or
18 addicted to the nicotine in cigarettes, then a smoker
19 would be fighting the conflict between the
20 information from the health community that smoking
21 may kill that person and the need to continue the
22 habit or addiction; true?

23 MR. SCHWARTZBAUER: Objection.

24 A. It's not that simple. People have strong
25 preferences about specific cigarettes. That's not --

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1 certainly it seems from what I've seen of claims in
2 the evidence that nicotine is perhaps the agent that
3 leads to habituations, but there are other things
4 too, because brand loyalty in fact is quite high in
5 the cigarette industry compared to most others.
6 People, smokers aren't just -- don't care just about
7 nicotine alone clearly, they have strong preferences
8 for the perceived values of the cigarettes that they
9 smoke.

10 Q. Well and the brand that they smoke most likely
11 has a given nicotine level; correct?

12 A. That's -- but that's not the only factor.

13 Q. But to the extent that the need to continue the
14 use of nicotine would be in conflict with health
15 reports suggesting terrible diseases and death, a
16 smoker would be faced with a conflict between those
17 two things in terms of continuing with smoking or
18 cutting back or stopping altogether; true?

19 A. I -- I don't remember -- I don't think you had
20 habituation anywhere in that question, did you?

21 MR. GILL: I -- would you read it back,
22 please.

23 (The record was read by the reporter.)

24 A. I don't think I understand the question.

25 Q. Assuming that the need for nicotine is based

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1 upon an addiction, such an individual would have a
2 conflict between continuing to smoke and gaining the
3 use of the nicotine and acting on the health
4 information that smoking might kill that person;
5 true?

6 MR. EISZNER: Objection.

7 A. Well that would be true of people who liked
8 apples, too, when confronted with Alar, I guess. If
9 you got information that something you like to
10 consume might hurt you, that creates a conflict.

11 Q. But it's much easier to stop using what might
12 hurt if you're not addicted to it?

13 MR. SCHWARTZBAUER: Objection.

14 Q. True?

15 A. I agree.

16 Q. If and if you are addicted to the thing that
17 might hurt you, the ability to get -- to continue
18 using the thing that might hurt you while eliminating
19 the risk to your health would be perceived as a great
20 benefit; true?

21 MR. SCHWARTZBAUER: Objection?

22 A. I'm sorry.

23 Could you read that again, please?

24 (The record was read by the reporter.)

25 A. Certainly for some people. See, what sticks in

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1 my mind as a good example of this is heroin and
2 methadone, which is an extremely clearly addictive
3 substance, and methadone I guess is believed by the
4 medical community to be much less threatening to
5 health and better for people, in fact they haven't
6 been able to convert that many people from heroin to
7 methadone it's my understanding, so it's tricky.

8 Q. And is it your understanding that part of the
9 reason for that is the highly addictive nature of
10 heroin?

11 A. I assume.

12 Q. Is it also your understanding though that --
13 that individuals sufficiently motivated can even
14 break a heroin addiction?

15 A. Yes.

16 Q. Now with respect to whether or not a conspiracy
17 among cigarette manufacturers was a plausible
18 occurrence in 1953-1954, one of the things that an
19 economist would look at would be what type of market
20 power the alleged participants in the conspiracy had
21 at the time; true?

22 A. Yes. I'm not quite sure what you mean by that,
23 but yes.

24 Q. Well if -- if the conspiracy was to restrain
25 trade in the -- in the cigarette industry, it

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1 wouldn't be very plausible if the conspirators held
2 only two percent of the market, would it?

3 A. Yes.

4 Q. On the other hand, if the conspirators held 80
5 or 85 percent of the market, a conspiracy would be
6 far more plausible?

7 A. Depending on conditions of entry.

8 Q. Other factors would be involved?

9 A. Right.

10 Q. But certainly market power, the extent of the
11 market power of the conspirators would be a
12 significant factor in determining whether or not the
13 conspiracy was plausible; true?

14 A. Well I don't know what you mean by market power
15 of conspirators. I would agree with that, if you
16 mean by market power do the conspirators acting as a
17 conspiracy have market power, I agree with that.

18 Q. Market power in the sense of market share of
19 sales of that particular product?

20 A. Well that would be one -- one useful piece of
21 information you'd look at as to whether they had --
22 whether the conspiracy would have market power.

23 Q. And you're familiar with the companies that were
24 marketing cigarettes domestically in 1953, early
25 1954?

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- 1 A. The larger ones.
- 2 Q. Who were the companies that you are familiar
3 with that were doing that at that time?
- 4 A. Doing -- selling cigarettes?
- 5 Q. Yes, domestically in 1953-54.
- 6 A. American Tobacco, R.J.R., Lorillard, Liggett &
7 Myers, Brown & Williamson. Did I say Lorillard? I
8 did. Liggett, I got the two L's, R.J.R. Who am I
9 leaving out?
- 10 Q. How about Philip Morris?
- 11 A. Yeah, that would be good. And Benson & Hedges,
12 and some others, Philip Morris. They were so small
13 at that time it's difficult to remember them.
- 14 Q. The seven that you just mentioned, did they have
15 the overwhelming share of the domestic cigarette
16 market in 1953-1954?
- 17 A. Yes.
- 18 Q. And if you excluded Liggett & Myers from that
19 group of seven, would the remaining six still have
20 the overwhelming share of the domestic market at that
21 time?
- 22 A. Yes.
- 23 Q. The remaining six would have over 80 percent of
24 the market at that time; true?
- 25 A. I think that's approximately right.

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1 Q. And with over 80 percent of the domestic market
2 for the sale of cigarettes would a conspiracy to
3 restrain trade be at least plausible with respect to
4 that group?

5 MR. SCHWARTZBAUER: Object to the form.

6 A. It would depend on the restraint.

7 Q. On what they were trying to restrain?

8 A. Yes.

9 Q. Now another aspect of the plausibility of a
10 conspiracy to restrain trade would be the
11 concentration of market power within the
12 conspirators; true?

13 A. Well I think that's what you just talked about,
14 that they had -- I don't understand the difference
15 between that and your hypothetical -- your assertion
16 that they had something around 80 percent or more of
17 the sales in the marketplace.

18 Q. Well does a conspiracy become even more
19 plausible if the market power of the coconspirators
20 is concentrated in say two members of the group?

21 A. Well I don't understand how you're using "market
22 power" because I said -- that's why I said carefully,
23 that I'd assess the market power of the supposed
24 conspiracy, whether the groups acting as a conspiracy
25 had market power, and one -- one thing that would

1 shed light on that is you'd look at what -- what
2 share they had in the market that was being
3 restricted, and that would be, you know, one piece of
4 evidence. For example, if you said they had two
5 percent of the market that was allegedly being
6 restricted, it's not likely a conspiracy to do
7 anything.

8 Q. Have you specifically during your consultation
9 on this case tried to determine what share of the
10 domestic cigarette market the six manufacturers had
11 in 1953-54? I'm excluding Liggett & Myers.

12 A. Well I think we had -- I don't remember if it's
13 in the supplementary materials -- we certainly had
14 historical information of share by company.

15 Q. You don't recall it offhand, just simply that
16 it's in excess of 80 percent for those six of the
17 seven?

18 A. Everybody but L & M, yeah, I would guess it's
19 bigger than 80 percent back then.

20 Q. And at that time do you have an understanding as
21 to whether Liggett & Myers' market share was
22 declining or rising?

23 A. At that moment?

24 Q. 53, early 54.

25 A. Well the shares had been somewhat volatile, so I

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1 don't remember whether they were going up or down at
2 that time.

3 Q. Were there two companies in 1953-54 that
4 dominated the domestic cigarette market?

5 MR. SCHWARTZBAUER: Object to the form.

6 A. I think there were two companies that had a lot
7 of the combined share of sales in that -- in that
8 period.

9 Q. And which companies we are those?

10 A. American and R.J.R.

11 Q. And approximately what percent of the domestic
12 cigarette market did they have at that time?

13 A. They had over 50, if I recall.

14 Q. Now another aspect to the plausibility of a
15 conspiracy would have to do with the relative levels
16 of barriers that would pertain to new entrants in the
17 market; correct?

18 A. Yes.

19 Q. In your review of the history of this -- did you
20 engage in at least some attempt to review the history
21 of the cigarette industry as part of your work in
22 this case?

23 A. Yes.

24 Q. In the course of that work, did you come to
25 understand that there were a number of cigarette

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1 companies that were created in approximately 1911
2 after an antitrust case had been brought against
3 American Tobacco and some other companies?

4 A. I think that's right.

5 Q. Between the end of World War I, which would be
6 1918, and 1953-1954 how many new entrants to the
7 domestic cigarette industry had occurred?

8 A. I don't know.

9 Q. There were none, were there?

10 A. I don't remember if there were any of any
11 significance. Remember, there's little cigarette
12 companies around, I think there's still some today,
13 so I don't know that it's really true, I don't know
14 whether anyone entered, and I certainly would guess
15 there probably was some little company producing
16 cigarettes somewhere that entered during that time.

17 Q. But the seven companies that we previously
18 identified as being the principal members of the
19 industry in 1953-54, they held over 99 percent of the
20 domestic market share at that time; correct?

21 A. Which time?

22 Q. 1953-54.

23 A. I don't know the exact number. Yeah, they were
24 overwhelmingly -- they represented overwhelmingly the
25 sales.

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1 Q. And were all those seven companies in existence
2 prior to 1918?

3 A. I don't know.

4 Q. Which aren't you sure about?

5 A. I don't -- I don't remember -- I don't -- I
6 reviewed the history of the industry, but not for
7 some time, and I don't remember those details.

8 Q. Can you think offhand of any new entry into the
9 domestic cigarette market that was launched after
10 1918?

11 A. I -- I don't know. I don't remember the history
12 that well to know whether there was anyone.

13 Q. And since 1953 have there been any new entrants
14 to the domestic cigarette market in terms of
15 manufacturers?

16 A. I -- well you say in terms of manufacturer, I'm
17 not sure about that. There have been little
18 companies that have come in at various times to the
19 industry.

20 Q. Can you think of anybody by name?

21 A. No, I think there's some listed in the -- in the
22 chronology in my report, but they're minor, small
23 players.

24 Q. None of them gained even one percent of the
25 market, did they?

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1 A. I don't think so.

2 Q. So essentially the cigarette market has stayed
3 the same domestically since 1953 in terms of the
4 major manufacturers that hold some appreciable market
5 share?

6 A. Well there are less than there were in 53.

7 Q. Because of what situation?

8 A. In -- Brown & Williamson bought American I guess
9 fairly recently, if I remember right, and somebody
10 bought Benson & Hedges, but I can't remember which
11 company, or somehow got merged into.

12 Q. Philip Morris?

13 A. I don't remember.

14 Q. But that occurred -- Philip Morris purchased
15 Benson & Hedges prior to -- No, no, strike that.

16 So the -- the players in the domestic cigarette
17 industry have actually contracted since 1953?

18 A. Yes.

19 Q. And assuming there were no new entrants of any
20 significance into the industry after World War I, we
21 would have a -- a domestic cigarette industry that
22 has not incorporated any new significant competitors
23 in approximately 80 years; true?

24 A. In manufacturing cigarettes in the U.S.

25 Q. And at least a couple of the manufacturers that

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1 did operate during that 80 years have now been
2 absorbed by other competitors?

3 A. Correct.

4 Q. So regardless of whatever barriers exist for new
5 entrants to overcome, during the last 80 years no new
6 entrants have emerged?

7 A. Well, again, I don't -- I don't -- I don't
8 remember what happened between 1918 and 1953. There
9 haven't been any significant entrants in terms of
10 gaining any significant share since 53.

11 Q. And a number of things have occurred between
12 1953 and now that would add to the barriers for a new
13 entrant into the domestic cigarette industry; true?

14 MR. SCHWARTZBAUER: Objection. Objection.

15 A. Well, the litigation and regulatory and
16 government exposure certainly has, other things
17 equal, made it less attractive to come in if the sort
18 of product you were going to come in with is the same
19 sort of products that are being produced in the U.S.
20 or elsewhere in the world. That would be a -- an
21 impediment that was larger than it was in 53, I
22 suppose.

23 Q. And there is a declining percentage of the
24 population that smoke; correct?

25 A. Yes.

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1 Q. That would be an impediment to the investment
2 that would be needed to enter this market; correct?

3 A. It would depend on the proposition. If we go
4 back to your proposition about the safer cigarette
5 that you can demonstrate and it's
6 commercially-acceptable, boy, that's a winner for
7 anyone it seems to me, that's a real entry
8 possibility, and one of the issues there is that the
9 market would probably no longer be declining,
10 tremendous upside possibility there, particularly
11 going back a few years.

12 Q. So you would agree that for even a foreign
13 manufacturer of cigarettes, if it could develop a
14 safe cigarette that was commercially-acceptable, even
15 a new entrant would be expected to gain substantial
16 market share?

17 A. Well, I give you all the same caveats as before,
18 but, yeah, if you did it right and you really have
19 this product that's commercially acceptable and you
20 got a lot of serious opinion makers behind the idea
21 that it was safer, that would be a good proposition.

22 Q. And you'd not only take market share away from
23 existing competitors in that situation, you might
24 well add a whole lot of individuals who had never
25 smoked before?

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1 A. Right, and you would have kept more. I mean
2 that's the -- one of the whole fundamental problems
3 with the Plaintiffs' case is if you assume that the
4 industry was a monopoly in 53, which it wasn't,
5 because I suppose there were only one firm, because
6 there are so many, undoubtedly the best thing for
7 that monopolist to have done would be to come up with
8 a safer cigarette, the monopolist would be twice as
9 big today as it is, as the industry is today if they
10 had been able to do that.

11 Q. So your estimate is that a safer cigarette would
12 have doubled the total consumption of cigarettes?

13 A. Well I'm speaking from studies that have been
14 done that that's an estimate of how much sales have
15 fallen because of losing smokers over time, and I
16 make the assumption if you -- if there wouldn't have
17 been this health controversy, if people's preferences
18 would have changed, it would have remained the same,
19 well that's probably not right, probably a little bit
20 aggressive assumption, but if you did have a product
21 that made this health concern go away and was
22 commercially-acceptable and you marketed it right and
23 everything worked right, the industry would be a lot
24 larger than it is today.

25 Q. When you refer to -- to your recollection of

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1 historical statistics, are you talking about the fact
2 that in the early 50s approximately 50 percent of
3 adults smoked and now approximately 25 percent smoke?

4 A. Well this is actually in terms of number of
5 cigarettes. It's -- it's cited in my report, a
6 study, measures how many more cigarettes the market
7 would be and what that would mean about the size of
8 the market today compared to what it actually is.

9 Q. And your conclusion of a doubling effect between
10 current consumption of cigarettes and what would be
11 the case with a commercially-acceptable, safer
12 cigarette was based upon a review of what materials?

13 A. There's a study -- there's a study, one that's
14 cited in the 1990 FTC report, but the study is
15 actually done by researchers I think just calculating
16 how much sales have -- how much are sales lower as a
17 result of people quitting or not taking up smoking.
18 And I'm saying if we assume that those sales would
19 not have been foregone, that's an aggressive --
20 that's too aggressive a consumption, there would have
21 been some fall off in smoking, I suspect, independent
22 of the health thing, but a lot of that would not have
23 been lost.

24 Q. But there's certainly nothing staggering about
25 the idea that if a commercially-acceptable, safer

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1 cigarette had been developed in the mid 50s that the
2 per capita consumption rate that existed as of that
3 time would likely have at least been maintained going
4 forward.

5 A. Well it wouldn't have fallen as much as it did.

6 Q. And certainly that's something that you would
7 expect the tobacco company executives would have
8 appreciated?

9 A. I think they increasingly appreciate it because
10 no one knew in 1953 whether the information would
11 turn out to be right; that is, whether -- whether it
12 would finally become commonly believed and accepted
13 by the medical community that the conclusion at that
14 time was right that the public would have reacted to
15 it and the quit rates and non-start rates would have
16 been so significantly impacted over time. Certainly
17 1953, you know, to some people in the tobacco
18 industry I'm sure it looked like Alar, this is yet
19 the latest scare and it's going to go away.

20 Q. Now another barrier to a new entrant to the
21 domestic cigarette industry would be the inability to
22 advertise the new brand on television; true?

23 A. Well that's part of -- if you've got the -- that
24 would -- that wouldn't help. Okay. But on the other
25 hand, if you had a product endorsed by the Surgeon

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1 General saying -- and you say this is it, and went
2 back far enough so that the medical community hadn't
3 become entrenched in the situation that it's not a
4 good idea, folks, there's no reason why you should
5 smoke and it's not healthy for you no matter what,
6 but the medical community was not of that view 20
7 years ago, there was a time in which you might have
8 done a lot if you had the right product at the right
9 time.

10 Q. But certainly the factor of being unable to
11 advertise a product on television --

12 A. But that's a matter of government policy. If
13 you say someone tomorrow dramatically comes up with
14 this thing and the medical community says this is it,
15 it's safer, we think it's still better that people
16 don't smoke it but we have to make a hard choice, do
17 we want to convert people to this thing which we're
18 convinced is safer, or say nothing, say no one should
19 smoke, there would be a serious policy discussion in
20 Washington, well maybe we should let these folks
21 advertise and endorse it, we could regulate it, we
22 could mandate, you know, we could abolish the other
23 cigarettes, you know. There are lots of things the
24 government could do in that situation.

25 Q. So a new entrant would at least have to be

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1 concerned about the possibility that it might not be
2 able to advertise its new brand on television based
3 on existing law; true?

4 A. Well, that would -- that would be an
5 impediment. It would be better, other things equal,
6 to be able to advertise on TV.

7 Q. And in this analysis of the plausibility of a
8 conspiracy, an impediment would be a barrier?

9 A. That would be -- well it would be an impediment.

10 Q. Which would be synonymous with being a barrier;
11 true?

12 A. Well I don't know what you mean by "a barrier".

13 A barrier -- an imped -- some people think of a
14 barrier as something you can't get over, whereas an
15 impediment is part of the things that add up to being
16 a barrier, so it would -- it would make it more
17 difficult.

18 Q. And then existing brand loyalty that you
19 mentioned before, that would be an impediment or a
20 barrier to plans by a new entrant to into the
21 domestic cigarette industry; true?

22 A. It would be an impediment, yes.

23 Q. And certainly back in 1953-1954 tobacco company
24 executives were aware of the concept of brand loyalty
25 you would expect?

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1 A. Yes.

2 Q. And back in 1953-1954 at least from the
3 perspective of tobacco company executives, domestic
4 tobacco company executives they may well have
5 perceived that the likelihood of new entrants into
6 their domestic market was not great?

7 MR. EISZNER: Object to the form.

8 A. I don't have any documents going -- tobacco
9 company documents going back that far, but I mean
10 there were economists that made that conclusion back
11 in that time and earlier that they thought that the
12 barriers to entry were high in the tobacco industry.

13 Q. Now in addition to those factors with respect to
14 the plausibility of a conspiracy, your report also
15 deals with some additional factors; does it not,
16 regarding plausibility?

17 A. Of a conspiracy?

18 Q. Yes.

19 A. Yes.

20 Q. One of those is the ability to monitor
21 compliance with the collusive agreement?

22 A. Yes.

23 Q. And another is some manner in which to punish an
24 offender?

25 A. Yes.

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1 Q. The ability to monitor and to punish would in
2 your view increase the likelihood that a conspiracy
3 would occur?

4 A. Well I think more that it's -- it's the other
5 way, that the absence -- that the absence of those
6 things makes -- makes a conspiracy, makes the idea
7 that there were -- there was a conspiracy more
8 unlikely. You'd think that these people would figure
9 that out, wouldn't they, and they'd realize that if
10 you don't have this ability, why would it make
11 sense?

12 Q. But the monitoring and the punishment wouldn't
13 be a "heads I win, tails you lose" sort of factor
14 with regard to plausibility of a conspiracy, would
15 it?

16 MR. SCHWARTZBAUER: Objection.

17 A. No, you could have people that enter into a
18 conspiracy in which the conspiracy doesn't make --
19 when you look at it doesn't make any sense; that is,
20 they could never pull it off.

21 Q. But certainly if the inability to monitor or
22 punish diminishes the likelihood of a conspiracy
23 occurring, then it also follows that the ability to
24 monitor and to punish would increase the likelihood;
25 true?

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1 A. Well, it would make an alleged conspiracy, other
2 things equal, more plausible, than if it wasn't true.

3 Q. Now are there any other factors regarding the
4 plausibility of a conspiracy that you believe are
5 pertinent here other than the ones that we've now
6 discussed?

7 A. Yeah, I think the two most important ones are --
8 we have not discussed.

9 Q. Which are those?

10 A. The first, most important one is that the
11 conspiracy is on its face implausible.

12 Q. Whether the conspiracy itself makes any sense.

13 A. No, whether -- whether it's in the interest of
14 -- you go back to the conspiracies in antitrust, we
15 think that conspiracies are situations where the
16 joint activities -- where it's in the interests of
17 the parties to do things jointly that it doesn't make
18 sense for them to do unilaterally, and this is the
19 whole theory, well, that the industry would perceive
20 jointly, gee, it doesn't make any sense for us to
21 come up with a safer cigarette I guess is part of the
22 allegation here, and that's just flatly wrong. The
23 industry would be far better -- would have been far
24 better off if it had come up with a safer cigarette
25 that worked, that would have sold. So the first

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1 thing is that it's just not -- there are any -- the
2 typical antitrust conspiracy, whether it's raising
3 prices or some other things, that the theory is
4 correct that the parties might gain more from the
5 conspiracy than without by -- by what the conspiracy
6 is suppose to be achieved. In this case the parties
7 to the conspiracy are harmed by the alleged
8 conspiracy.

9 Q. But your view is that to make the conspiracy
10 plausible, the parties to the conspiracy have to gain
11 more from their collective action than they are
12 likely to achieve from their unilateral action; is
13 that a fair way to put it?

14 A. Yeah, but there's more than that -- than that in
15 this case, which is this -- the -- the -- the effect
16 of this alleged conspiracy, if true, in fact harms,
17 it makes them worse off.

18 Q. Explain that, please.

19 A. In that -- in that the market -- as I said, the
20 market today would be, you know, much bigger than it
21 is. There would be companies today that were much
22 bigger. All the companies today would be much bigger
23 than whatever the survivors were. They would be more
24 profitable.

25 Q. For the survivors?

1 A. Well I don't -- well I don't even think the
2 issue of surviving. I think the industry as a whole
3 would be, you know, much better, demand wouldn't have
4 shrunk so substantially, anywhere near as
5 substantially. The --

6 Q. Well you -- go ahead.

7 A. The bad publicity and the -- the resulting push
8 it gave for increased taxation and other sorts of
9 things, which have harmed the industry, would --
10 would have been much more modest.

11 Q. If one company had come up with a
12 commercially-acceptable, safe cigarette and had
13 patented the process, it could have excluded all its
14 competitors from the use of that process; true?

15 A. Legally or --

16 Q. Yes.

17 A. -- in reality?

18 Q. Legally.

19 A. Well, I doubt it.

20 Q. Are you -- do you have any familiarity at all
21 with patent law?

22 A. Yes, I do.

23 Q. All right. You understand that if -- if a
24 company came up with a commercially-acceptable, safe
25 cigarette, it's likely that the U.S. Patent Office

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1 would have recognized it as an invention -- invention
2 suitable for issuance of a patent?

3 MR. SCHWARTZBAUER: Object to the form.

4 A. If it was novel, useful and non-obvious.

5 Q. Yeah.

6 A. So --

7 Q. But almost by definition a
8 commercially-acceptable safe cigarette would meet
9 those requirements; true?

10 A. Hopefully. But then, you know, you have to get
11 the patent in place. There are some extraordinary
12 innovations that aren't patentable. But I -- let's
13 assume it's patentable. I'm not saying that -- it
14 certainly sounds like a winner to me.

15 Q. All right. And if it is a winner --

16 A. And I'm saying what would you -- what would the
17 companies have done in this situation with
18 competitors, if it really was this good thing? And
19 they would have -- they would have infringed in a
20 second, --

21 Q. And --

22 A. -- and they would have sued, they would have
23 counterclaimed, and this thing would be in litigation
24 forever, and particularly if it was the 50s and the
25 60s this patent would have been found -- you know,

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1 this is all speculative, but I do know something
2 about the history of patent antitrust -- the patent
3 would have been found valid, if -- if the U.S.
4 government had not acted in that case to force
5 compulsory licenses. I think it's a non-starter, in
6 a situation where the government believed this
7 product is safe, these things are not, you're going
8 to monopolize that product, I think it's not very
9 likely that that -- that that so-called monopoly
10 would have been sustainable.

11 Q. A patent is a monopoly; is it not, government
12 authorized?

13 A. No, the question is whether it's enforceable.

14 Q. Well if it's found to be valid it would be
15 enforceable?

16 A. But being enforceable doesn't mean that you can
17 keep people from infringing.

18 Q. Well if it's enforceable you can obtain a
19 permanent injunction against infringers; can you not?

20 A. In theory.

21 Q. And you understand that a patent holder isn't
22 under any obligation to license use of the patent to
23 infringers?

24 A. 1950s and 60s law is a little more ambiguous on
25 that on what the duties are of licensing, but I'm

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1 just -- I mean I'm speculating not on the -- with
2 some expertise because I've written about the patent
3 law and the antitrust law during that period, and
4 there's stuff in the documents also suggesting that
5 -- that if someone did come up with this magic
6 bullet, would they really be able to keep it to
7 themselves? And I think as a matter of public policy
8 and the patent law and stuff at that point, you know,
9 I think there's certainly considerable doubt whether
10 that would be true.

11 Q. And when you say --

12 A. I would agree whoever came up with it probably
13 would have an advantage.

14 Q. But with respect to references in the documents
15 that you've seen to such a potential situation, did
16 any of those references include a patent law
17 analysis?

18 A. Yeah, they -- yes, I think specifically they
19 said there was a view, it was just a couple sentences
20 saying -- it sounded like someone had looked at
21 situations like this and come to the conclusion that
22 you wouldn't be able to keep from licensing it.

23 Q. So it's on the basis of that couple sentences of
24 analysis that you're of the view that the patent
25 holder would be unable to resist licensing requests?

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1 MR. SCHWARTZBAUER: Objection.

2 A. No. No. I'm saying that was -- I'm saying that
3 was recognized in the documents. I'm saying my -- my
4 view of the patent law during that time and of the
5 public policy implications, because the patent is
6 just one thing, the government has a lot of rights to
7 deal properly with with public interest and public
8 health at that time, there are lots of things at that
9 point the government could do independent of the
10 patent law, which is done in other situations, forced
11 compulsory licensing. That's what the Canadian
12 government did for pharmaceuticals.

13 Q. In which instances are you aware of in which the
14 United States government has forced compulsory
15 licensing?

16 A. I don't know whether there are r any. Certainly
17 have been serious consideration of that at various
18 times, but I know other governments have done that.

19 Q. And if someone came up with a
20 commercially-acceptable, safe cigarette, the
21 government could well take the view that there's no
22 problem here, everybody can use and smoke the new
23 product?

24 A. Could.

25 Q. And if the government took that position and

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1 allowed the patent holder to enforce its patent over
2 the 17-year life of the patent, there wouldn't be any
3 other cigarette companies marketing in the United
4 States at the end of the 17th year, would there?

5 A. It -- it depends. You got brand loyalty, you
6 got other things, you know, people --

7 Q. But the --

8 A. I doubt that's true.

9 Q. The competitive advantages that would have
10 accrued to developing that commercially-acceptable,
11 safer cigarette were of such a magnitude that it was
12 definitely possible that any company that did so
13 would garner the entire market?

14 A. No, I don't think that's -- I wouldn't agree
15 with that.

16 Q. If it were able to enforce a patent and prevent
17 other companies from infringing and those other
18 companies weren't able to come up with some other
19 method of producing the commercially-acceptable,
20 safer cigarette?

21 MR. SCHWARTZBAUER: Objection.

22 A. No, I don't agree.

23 Q. What's the other -- have you already told me
24 about the second additional factor --

25 A. Well we --

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1 Q. -- that you have addressed with regard to the
2 plausibility of a conspiracy?

3 A. Well we were-- we went on a detour here, so just
4 to repeat: The conspiracy on its face doesn't make
5 any sense; that is, it would -- if successful was
6 undoubtedly going to make the industry much smaller,
7 we know in retrospect much smaller, and have
8 immensely more problems of all kinds; litigation,
9 regulatory exposure, taxation, anything you can think
10 of, than if the industry would have been able to come
11 up with a safer cigarette, so the thing that would
12 have been in the interest of the industry, acting
13 together, was to act together to as quickly as it
14 could come up with a safer cigarette. That would
15 have been a far superior alternative. The second --
16 the second analysis on the -- bearing on the
17 likelihood of a conspiracy is that -- related to you
18 talking about market power, and I said what -- what's
19 being restricted -- the allegations in this case are
20 what's being restricted is not the sales of
21 cigarette, unit sales of cigarettes or increasing the
22 price which are the typical focus of antitrust code
23 of silent conduct, it is the production of
24 information, the production of research are at the
25 core of these allegations, and it's an obvious fact

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1 that the main -- that the U.S. cigarette companies do
2 not have any -- do not have a substantial share of
3 the production or capacity for research on smoking
4 and health or information on smoking and health.

5 Q. But if the conspiracy were aimed at increasing
6 the consumption of cigarettes over what it would
7 otherwise have been, that would make sense with
8 respect to providing a motivation to conspire; true?

9 A. Well I -- we just said the motivation would have
10 been to come up with a safer cigarette. That would
11 have been the best idea to increase consumption.

12 Q. All right. But any conspiracy that would have
13 increased consumption in some artificial manner over
14 what it otherwise would have been, absent a
15 conspiracy, would make sense in terms of motivation;
16 true?

17 MR. EISZNER: Objection, unintelligible.

18 MR. SCHWARTZBAUER: Yeah, objection.

19 A. No, I don't know what you're --

20 Q. If the conspirators come up with a conspiracy
21 that they believe will lead to increased consumption
22 of their product over what it otherwise would be
23 absent a conspiracy, then they have a plausible
24 reason to conspire; do they not?

25 A. Well that sounds like something completely

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1 opposite of what antitrust cases are about. If it's
2 to increase consumption and not increase the price.
3 And that's -- a lot of joint activities are like
4 that; R&D, joint marketing, other sorts of things.
5 There are a lot of joint activities of competitors
6 exactly for that purpose, to increase output, and
7 that's usually our test under Section 2; if this
8 thing's really designed to increase output, it can't
9 violate the antitrust laws because that's -- again
10 that's what the antitrust laws are meant to preserve.

11 Q. Assuming that the increased output causes a
12 reduction in price?

13 A. No, assuming that it's not an increased output
14 that results from exclusion of competition by
15 substitutes.

16 MR. GILL: Would you read that back,
17 please.

18 (The record was read by the reporter.)

19 Q. If we've got an increased consumption of harmful
20 products, that would be inimicable to the goals and
21 objectives of the antitrust laws; true?

22 A. Of what sort of products?

23 (The record was read by the reporter.)

24 A. No. Actually --

25 Q. So the antitrust laws -- Strike that.

1 First of all, the antitrust laws do seek to
2 improve the quality of products; true?

3 A. Well again, laws don't produce products or
4 quality, they --

5 Q. One of the goals?

6 A. Is to -- is to try and ensure market conditions
7 are such that the quality of products that can be
8 produced and, you know, which people desire ends up
9 matching as best it can without anti-competitive
10 restrictions.

11 Q. But one of the goals of antitrust law would be
12 to promote market conditions conducive to improving
13 the quality of products; correct?

14 A. Not much. This is a very, very, very tricky
15 area of the law where you're dealing with areas of
16 the law which really conflict with one another. The
17 FTC is a good example of that. The FTC under Section
18 5 has authority to enforce the antitrust laws and it
19 has, but it also has authority under Section 5 to
20 deal more specifically with quality of the claims,
21 advertising, and those powers and public -- and
22 purposes are different. That's why the FTC is often
23 trying to restrain competition in advertising, and in
24 the range of quality of advertising and messages and
25 things, because it thinks it's in the interest -- not

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1 necessarily in the public interest to have that, so
2 the antitrust laws are not, there are other laws
3 which are much more about quality than antitrust.
4 Q. But the antitrust laws are not limited in terms
5 of their goals to simply reducing the price of
6 products; are they, to creating market conditions
7 that would reduce the price of products?

8 A. Yeah, I agree, yeah.

9 Q. And one of the additional goals of antitrust law
10 would be to create market conditions that not only
11 reduce the price of products but perhaps instead
12 improve the quality of products?

13 A. Well again, I wouldn't put it that way. It
14 would -- it would -- it would try to seek out
15 activities which were anti-competitive that might
16 have the effect of reducing quality.

17 Q. And conspiracies that promote the consumption of
18 inferior or even hazardous products would be
19 inimicable to the goals of antitrust law; true?

20 A. It wouldn't necessarily have anything to do with
21 the antitrust law.

22 Q. That's your understanding of antitrust law
23 having --

24 A. I'd have --

25 Q. -- read the statutes and the cases?

1 A. I'd have to know more about the situation.

2 MR. EISZNER: Just so the record is clear,
3 I believe you asked the question in the middle of him
4 completing his answer to the previous question, so
5 perhaps we could have the last two answers and your
6 question read back so that --

7 Q. Was there a part of an answer that you didn't
8 get a chance to complete?

9 A. Well I suspect there was from the sound of the
10 objection, so we are getting close to lunch so we
11 maybe have been free-forming than we should.

12 MR. GILL: Let's go ahead and read it back
13 so he has a chance to add if there was something. I
14 didn't realize there was anything that you wished to
15 add.

16 (The record was read by the reporter.)

17 MR. EISZNER: That's it, and I think the
18 "I'd have to know more about the situation" was not
19 an answer to your extension about reviewing antitrust
20 law and the cases. He was answering the prior
21 question.

22 BY MR. GILL:

23 Q. Well I didn't understand it that way, but is
24 there anything that you wish to add to that answer?

25 A. The answer to which question?

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1 Q. The one that was just read back to you.

2 A. I don't remember what my understanding was.

3 Q. I think we should just -- just go ahead.

4 A. Okay.

5 (Comments off the stenographic record.)

6 Q. The two additional factors that you wanted to
7 tell me about with respect to the plausibility of a
8 conspiracy had to do first with whether the collusive
9 agreement would have advanced the interests of the
10 coconspirators. That was the first one; correct?

11 A. Yes.

12 Q. And the second one was whether the alleged
13 conduct would have restrained sales or price?

14 A. No.

15 Q. Okay. What's the second one?

16 A. The second one, which is the conspirators --
17 this is laid out in my report -- the conspirators
18 have to be -- have to have the ability actually to
19 restrict whatever it is they're conspiring to
20 restrict. As I said, this isn't about restricting
21 price or output, this is about restricting
22 information or research, so you have to be careful in
23 defining markets in how you do the antitrust
24 analysis. And you've reminded me there's one other
25 thing, one other component in my report on the

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1 collusion analysis.

2 Q. But before we leave this one; in other words,
3 the coconspirators need to have the wherewithal to
4 accomplish the restriction that they seek?

5 A. They have to -- as a conspiracy, have to have
6 market power in the market of what they're trying to
7 restrict, roughly speaking.

8 Q. All right. And I think we've talked about
9 market power. All right. Now what's the next one?

10 A. An effective conspiracy requires being able to
11 actually reach an agreement as to what the conspiracy
12 is about, so the ability to reach a consensus.

13 MR. GILL: All right. All right. Now is a
14 good time to break. How much time do you want, Bob?

15 MR. SCHWARTZBAUER: I don't care. Hour.

16 MR. GILL: Hour is fine.

17 (Luncheon recess from 12:14 to 1:17 p.m.)

18 A F T E R N O O N S E S S I O N

19 BY MR. GILL:

20 Q. Incidentally, Dr. Scheffman, how did you gain
21 access to the documents from the files of the tobacco
22 companies that you reviewed in connection with the
23 preparation of your report?

24 A. Sent to me by Mr. Schwartz -- Schwartzbauer.

25 Q. Did you have any understanding of what selection

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1 process he was using?

2 MR. SCHWARTZBAUER: Before we go too far on
3 this, I think you realize, Mr. Gill, that we're
4 getting into areas that potentially raise work
5 product issues. I don't think that particular
6 questions does, so I'll let him answer it, but if we
7 get too much further we'll object to it.

8 A. I think LEC -- LECG staff in some cases made
9 selections from catalogs or something. In other
10 cases Mr. Schwartzbauer sent me things that I
11 requested.

12 Q. What types of catalogs?

13 A. I don't know what -- I don't know what it was.
14 I don't think I ever saw it. I think I might -- at
15 one point had one of the staffers send some -- I
16 don't know whether it was -- I don't know what it
17 was.

18 Q. And which documents did you ask Mr.
19 Schwartzbauer to send you?

20 A. Well, we asked for documents on marketing,
21 strategic plans, R&D, research act -- and development
22 activities, documents, many documents talking
23 obviously about alleging any industry understandings
24 or agreements or anything.

25 Q. How many documents did you get from Mr.

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1 Schwartzbauer approximately?

2 A. Many.

3 Q. Can you be more specific?

4 A. Well as I say, there's many, many cited in my

5 report, and I think we have many, many others that

6 aren't cited. You have the --

7 Q. Are we talking --

8 A. You have the list in my report.

9 Q. All right. The list in the back of your report

10 shows every document that you were provided?

11 A. I don't know whether that's the list, or whether

12 the list -- I don't know whether that includes the

13 things that are in the report or -- the things in the

14 report are everything I had gotten at the time of the

15 report.

16 Q. Do you have a recollection of approximately how

17 many documents that was? Are we talking about

18 hundreds, thousands, tens of thousands?

19 A. Well I assume it's hundreds, but I don't -- I've

20 never counted them.

21 Q. Do you know whether you were provided with any

22 documents from any privileged log that any of the

23 Defendants in -- in this case have created; in other

24 words, any documents that were allegedly subject to

25 attorney-client privilege or work product privilege?

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- 1 A. Not that I know of.
- 2 Q. Now, did you review the Frank Statement in
- 3 preparation for your deposition?
- 4 A. Yes.
- 5 Q. Had you reviewed it prior to preparation for
- 6 your deposition?
- 7 A. Yes.
- 8 Q. Is it one of the documents that Mr.
- 9 Schwartzbauer sent you?
- 10 A. Yes.
- 11 Q. Let me show you what's been marked as Exhibit
- 12 3500. Do you recognize this as a copy of the Frank
- 13 Statement?
- 14 A. Yes.
- 15 Q. And down at the bottom of it appear the sponsors
- 16 for the statement; true?
- 17 A. Yes.
- 18 Q. The sponsors include six of the seven cigarette
- 19 companies that were the major market members in late
- 20 1953, early 1954; true?
- 21 A. Yes.
- 22 Q. Everyone but Liggett & Myers?
- 23 A. I'll tell you, I'm not -- I won't count them
- 24 up. I see Liggett is not there so I take it that's
- 25 six of the seven.

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- 1 Q. Well we've got American Tobacco; correct?
- 2 A. Yeah.
- 3 Q. Benson & Hedges, Brown & Williamson, Lorillard,
- 4 Philip Morris and R.J. Reynolds?
- 5 A. Yes.
- 6 Q. Now is your understanding that this was an
- 7 advertisement that appeared in several hundred U.S.
- 8 newspapers in the early part of 1954?
- 9 A. I think it was widely published.
- 10 Q. You're not --
- 11 A. I don't really remember.
- 12 Q. You're not familiar with the fact that it
- 13 appeared in several hundred newspapers?
- 14 A. I don't remember the details of the numbers, no.
- 15 Q. Is it your understanding that the sponsors of
- 16 the ad attempted to give it as wide a circulation as
- 17 reasonably possible, within the United States?
- 18 A. I don't -- I think they were trying to
- 19 disseminate this. I don't remember the details of
- 20 whether every town and hamlet --
- 21 Q. Right, but do you recall that the attempt was to
- 22 achieve a very wide dissemination of this ad as
- 23 opposed to some narrow focused type of dissemination
- 24 in a relatively small geographical area?
- 25 A. I think it wasn't the latter.

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- 1 Q. But it was the former; correct?
- 2 A. Well I don't remember the detail. I agree that,
- 3 if I recall, the -- the strategy was to get this
- 4 pretty wide -- wide circulation.
- 5 Q. And the statement on its face is a message to
- 6 cigarette smokers; correct?
- 7 A. Yes.
- 8 Q. And it contains a number of pledges from the
- 9 sponsors?
- 10 A. Well it includes one pledge and various
- 11 assertions, statements.
- 12 Q. What's the one pledge that you see?
- 13 A. Well it's number 1. I'm just reading, I don't
- 14 know this from memory, but I see number 1 says
- 15 they're pledging aid and assistance to research
- 16 efforts, and then going on to what other -- what
- 17 things they're going to actually do.
- 18 Q. All right. Now you're referring to the word
- 19 "pledging" that appears under what's enumerated as
- 20 item number 1 on the right-hand column of the ad; --
- 21 A. Yes.
- 22 Q. -- correct?
- 23 A. Yes.
- 24 Q. So the sponsors are pledging aid and assistance
- 25 to the research effort into all phases of tobacco use

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1 and health; correct?

2 A. Yes.

3 Q. That would assumedly be reassuring to smokers?

4 MR. SCHWARTZBAUER: Objection.

5 A. I don't know.

6 Q. Well --

7 A. That's -- that's the intention, I suppose, but I
8 don't remember if there's any research on what
9 smokers took away from this.

10 Q. Do you understand though that this ad is
11 intended to respond to the widely-publicized
12 scientific studies from 1953 that implicated smoking
13 and lung cancer in terms of a cause and effect
14 relationship?

15 MR. SCHWARTZBAUER: Objection.

16 A. Yes.

17 Q. In fact the statement starts out in the very
18 first paragraph with an indirect reference to that
19 situation; does it not?

20 A. Yes.

21 Q. So in light of the recent reports that have
22 given wide publicity to the theory that cigarette
23 smoking is in some way linked with lung cancer in
24 human beings, assumedly smokers would be reassured to
25 know that the cigarette industry is pledging aid and

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1 assistance to the research effort into all phases of
2 tobacco use and health; true?

3 MR. SCHWARTZBAUER: Objection.

4 A. No, I mean that's an empirical issue, as to
5 whether people were reassured.

6 Q. Well at least the intent -- the intent appears
7 to have been to reassure; --

8 MR. SCHWARTZBAUER: Objection.

9 Q. -- true?

10 MR. SCHWARTZBAUER: Objection.

11 A. To reassure them as to what?

12 Q. To reassure smokers that the cigarette industry
13 was doing something about these recent reports that
14 linked smoking with lung cancer in human beings.

15 MR. SCHWARTZBAUER: Same objection.

16 A. I think the intent was to tell smokers what this
17 tells them, that we -- we understand there's this
18 controversy and this is what we're -- this is what
19 were doing about it.

20 Q. In an effort to reassure smokers that something
21 appropriate is being done about these concerns by the
22 manufacturers of the products that have been linked
23 to lung cancer?

24 MR. SCHWARTZBAUER: Objection.

25 A. Well I don't know what -- I don't know what

1 "reassure" means. It is to communicate that we are
2 doing this, that this is what we are doing.

3 Q. You do understand that there were millions and
4 millions, tens of millions of smokers back in 1953 in
5 the United States?

6 A. Yes.

7 Q. And assumedly these reports that linked smoking
8 with lung cancer in human beings that occurred in
9 1953 would have been of concern to at least a
10 significant portion of those smokers; true?

11 MR. SCHWARTZBAUER: Objection.

12 A. Well, we know from survey evidence and the
13 effect on sales that that information had an effect
14 well after this in fact occurred, some of it well
15 after this circulation of this ad.

16 Q. And it's very logical that reports that linked
17 smoking with lung cancer occurring within a short
18 period of time in the year 1953 would have raised
19 those sorts of concerns in people that used those
20 products; true?

21 A. It's certainly possible it could and the
22 empirical evidence indicates that it did.

23 Q. And in response to that it is not surprising
24 that manufacturers of cigarettes attempted to form a
25 strategy that would reverse that trend of lower

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1 consumption of their products; true?

2 A. Well I don't know when they -- I don't know when
3 the -- remember the dates of this ad. You remember
4 again a lot of the decline - the dramatic decline in
5 consumption occurred over a two or three or four year
6 period, so I can't remember the dates, if this is
7 relatively closer to the adverse publicity the
8 decline in sales hadn't really hit that much yet,
9 depending on how much lag it was, and it accelerated
10 for a while.

11 Q. You can assume that the ad appeared in January
12 of 1954. Does that help you?

13 A. Yeah, I would say that most of the decline --
14 most of the decline arising from the adverse impact
15 occurred after this ad, if I remember right.

16 Q. And is it reasonable to assume that the
17 cigarette company executives were concerned that the
18 publicity in 1953 from these scientific reports that
19 linked smoking with lung cancer would in fact have a
20 chilling effect on sales of cigarettes?

21 A. I think that was one concern they would have.
22 It's certainly not the only one.

23 Q. And with respect to at least that particular
24 concern, it would be reasonable to expect that
25 individual cigarette companies would attempt to

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1 develop strategies to reverse or at least retard such
2 a chilling effect; true?

3 A. I'm saying the strat -- the companies in this
4 situation would have certainly been concerned about
5 what was happening to the sales, although I don't
6 think that was being -- the real impact hadn't been
7 felt yet by then. I mean a more serious issue is
8 that as to the reputation and the controversy for the
9 industry would be a major concern. I don't think
10 they had any idea probably in January 1934 how big a
11 hit in sales the controversy would result in.

12 Q. But the prudent action of management for a
13 company that was faced with a potential drop in sales
14 would be to try to take preemptive action to
15 eliminate or at least reduce the drop in sales that
16 might occur in the future; true?

17 A. I keep saying I don't know that that would be
18 fair to say that that would be their prime
19 motivation, I don't know, but most companies would be
20 -- any company seriously concerned independent of
21 the effect on the bottom line if information comes
22 out that says bad things about their product, they
23 would be concerned of that independent of the
24 immediate impact of sales.

25 Q. And certainly bad things about their product, if

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1 believed, would likely translate into adverse effects
2 relative to the bottom line of their profits;
3 correct?

4 A. Could very well.

5 Q. Now you've read this Frank Statement over
6 several times, I take it, prior to today?

7 A. I have read it a few times.

8 Q. In reading it over did you come to the
9 conclusion that the ad was an effort on the part of
10 the cigarette industry to reassure smokers not to
11 quit?

12 A. I -- I don't think that's the primary purpose.
13 I -- I mean I -- my opinion is that's probably not
14 the primary purpose. They have a -- a very serious
15 public relations problem, to say nothing of maybe a
16 serious problem that goes beyond public relations
17 here that they're trying to deal with.

18 Q. All right. Would reassuring smokers not to quit
19 be at least one of the purposes of the ad as you see
20 it?

21 A. It could be, but I don't know that that's the --
22 I don't think that's the -- I don't think that's the
23 primary concern because I don't think there was
24 publicity that people were quitting in droves as a
25 result of this by January 54. I really think the

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1 concern is is that with this -- the reports got such
2 currency in the media that it raised serious -- you
3 know, very serious issues that any company in the
4 industry would be concerned about, beyond the bottom
5 line, that saying, you know, we are -- you know, we
6 are bona fide, reputable companies and we can't
7 remain in our foxholes and not say anything about
8 this, and this is -- so here's what we have to say.

9 Q. So your interpretation is that the primary
10 purpose of the ad is to advance the integrity of the
11 management of the cigarette companies?

12 MR. SCHWARTZBAUER: Objection.

13 A. I think that that would be important. I don't
14 know the -- you know, I don't know the details of
15 what -- of the decisions that went into this, but I
16 think that would be very important.

17 Q. Is there some other interpretation of the ad
18 that you found to be of greater primacy?

19 A. Than -- than that?

20 Q. Yeah.

21 A. No, I'm saying that it's not -- it's not fair to
22 conclude that this was -- this was, you know, totally
23 motivated by the bottom line. I just don't believe
24 that that's likely to be true.

25 Q. Well. Do you believe it's likely to be true

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1 that at least to a significant extent the ad was
2 motivated by concerns about the bottom line, whatever
3 other reasons may have existed to run the ad?

4 A. No, I don't know that, and I've -- I've -- I
5 don't -- I don't have the -- the facts on this
6 because it goes back so far. I know in other
7 situations the prime motivation of the company in
8 dealing with the adverse publicity was with the
9 challenge to its integrity.

10 Q. And you've researched a number of those other
11 situations as set forth in your report?

12 A. Yes.

13 Q. But did you specifically research the time and
14 events that were transpiring back in 1953 and early
15 1954 with respect to the timing of this ad and what
16 it might have been responding to?

17 A. Well I know it was responding to the publicity
18 about the health studies that had come out proximate
19 to that.

20 Q. Did you know, for instance, that the -- that the
21 stock market price of cigarette companies had
22 significantly declined in the wake of the scientific
23 reports linking smoking to lung cancer?

24 A. I don't -- I don't recall that specifically. I
25 wouldn't be surprised.

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1 Q. If that were the case, if the stock prices of
2 the cigarette companies had declined noticeably,
3 significantly by the time this ad was run, would that
4 suggest to you that one of the purposes of the ad was
5 indeed to preserve the bottom line?

6 A. Oh, I didn't say that that wasn't -- that
7 wouldn't be part of the motivation. I don't think --
8 I think that that would -- that would typically come
9 into the -- to the assessment of the situation and
10 what to do about it, but I think from other
11 situations where I -- which I have more information
12 about, in some cases, you know, the primary
13 motivation is that it's a fundamental attack on the
14 integrity of the company that causes problems in the
15 press, it causes problems with your employers, your
16 employees, it causes moral problems, and questioning
17 about, you know, what are we doing, is this true, and
18 there are lots of serious issues beyond the
19 short-term bottom line that these issues impose.

20 Q. So at least you're not going to rule out the
21 likelihood that the bottom line sales and profits of
22 the tobacco companies was one of the things that
23 motivated the placing of this ad?

24 A. I'm sure, yes, with this many parties I'm sure
25 they had lots of different objectives, and I would

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1 doubt -- I would assume that some of them at least
2 took that into account.

3 Q. Now after making reference in the very first
4 paragraph of the Frank Statement to the recent
5 reports, the next several paragraphs go on to suggest
6 that these recent reports may not necessarily be
7 reliable; is that a fair interpretation?

8 MR. SCHWARTZBAUER: Objection.

9 A. No, I think what's remarkable is that -- not
10 remarkable, but noteworthy -- there was no aspersions
11 cast on the reliability of the research or on the
12 researchers, as there are sometimes in this case, the
13 ad says these are bona fide, respectable researchers,
14 we don't -- you know, we're not saying that there's
15 something wrong with the study, but we're saying that
16 there are -- there are reasons to question whether
17 the conclusion of the study, the cosmic conclusion of
18 the study is correct, and here's some things about
19 that, here's some reasons why we think that's true,
20 and nonetheless, you know, this is a serious issue
21 and we're doing the following things about it.

22 Q. And under the circumstances it would certainly
23 be more prudent to take that attitude than to simply
24 go out and disparage the motives of these
25 researchers; true?

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1 A. I think oftentimes in these situations the
2 companies or the industries choose the latter
3 strategy actually.

4 Q. And that would normally be imprudent; would it
5 not?

6 A. Well I don't know whether it would be --
7 sometimes in these situations it's -- it's actually
8 true, that there are aspersions that you should cast
9 on the characters that are making these things, if
10 you can go back and find who is spreading the rumor
11 that Proctor & Gamble's symbol is satanic or
12 something, but there are other situations, as we
13 know. There's General Motors and Ralph Nader where
14 allegedly quite different approaches were taken to
15 adverse information getting out. And this one is one
16 which the industry didn't disparage the researchers
17 or the research, it just said, you know, there are
18 reasons why we think this is probably not right or
19 questionable and we're looking into it.

20 Q. So --

21 A. Which is -- which is the correct -- which is the
22 correct approach to use depends on the situation and
23 the company I think.

24 Q. So certainly the sponsors of the ad did
25 challenge the conclusions of what they referred to as

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1 the recent reports; true?

2 MR. SCHWARTZBAUER: Objection.

3 A. I think the conclusion of the reports was the
4 reports in themselves couldn't prove that smoking
5 caused lung cancer. What they did indicate for the
6 first time in more -- in more complete studies is
7 that there was a biological basis for that belief
8 beyond the statistical, but the researchers couldn't
9 claim that this was the proof, because researchers
10 know that to do that you'd have to have shown that
11 cigarette smoking caused cancer in a human lung and
12 this had nothing to do with that, this was if you
13 painted stuff on the backs of mice what happened. So
14 but it was interpreted in the media and it was
15 suggested that this was -- this was, you know, the
16 strongest proof thus far of a biological nature of a
17 -- supporting the statistical evidence.

18 Q. Well and if the reports that suggested that the
19 combination of the biological research on mice and
20 the statistical experiments or epidemiological
21 studies were in fact valid with respect to the
22 conclusions they reached, that would be a piece of
23 information of grave concern to smokers; true?

24 MR. SCHWARTZBAUER: Objection.

25 A. Well it would depend on what the interpretation

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1 you'd make from -- of the results. Okay. Again --

2 Q. But --

3 A. -- because this was about painting mouse skin
4 with cigarette condensate, it was not anything a
5 scientist would think was a direct proof that would
6 involve an understanding of the mechanism and
7 identifying the substance that caused the problems.

8 Q. But if in fact smoking was one of any chain of
9 events that led to lung cancer, that situation would
10 be a source of grave concern to a smoker; true?

11 MR. SCHWARTZBAUER: Objection.

12 MR. EISZNER: Objection.

13 A. I assume that for most normal smokers that they
14 would -- that would be a matter of significant
15 concern.

16 Q. And the more dependent the individual was on
17 smoking, the greater the level of concern would
18 likely be; true?

19 MR. SCHWARTZBAUER: Objection.

20 A. I think probably the level of concern would be
21 more related to how long the smoker had smoked up to
22 that point.

23 Q. But all the -- if the information was in fact
24 valid that linked smoking to lung cancer, then the
25 only thing a smoker could do about the information

1 then was to quit or reduce consumption in order to
2 address the concern?

3 A. If they wanted --

4 MR. SCHWARTZBAUER: Object --

5 A. If they wanted to address the concern.

6 Q. And if they wanted to address the concern by
7 reducing or eliminating the smoking of cigarettes,
8 then the more dependent they were on the cigarettes
9 they were smoking, the more concerned they would
10 likely be about this information?

11 MR. SCHWARTZBAUER: Objection.

12 Q. True?

13 A. I don't know. I don't know, but I don't think
14 so. I don't think so necessarily, but I don't think
15 I understand the question.

16 Q. If their concern would have prompted them to
17 reduce or eliminate cigarettes from their use, the
18 more dependent they were on the cigarettes the harder
19 it would be to quit, or reduce consumption; true?

20 MR. SCHWARTZBAUER: Objection.

21 A. Well I -- it's a compound question. I would
22 agree that -- I guess tautologically the more
23 habituated they were the more difficult they'd find
24 it to quit.

25 Q. And the more alarmed they might be by the

1 prospect that the smoking might give them lung cancer
2 if they were going to find it very difficult to quit?

3 MR. SCHWARTZBAUER: Objection.

4 A. I don't -- I just don't think that's right.

5 Q. But in any event, in the Frank Statement the
6 sponsors are saying to cigarette smokers We don't
7 agree with the conclusions drawn by these recent
8 reports that link smoking to lung cancer?

9 MR. SCHWARTZBAUER: Objection.

10 Q. True?

11 MR. SCHWARTZBAUER: Objection.

12 A. No, I think they're not -- that the
13 interpretation of the reports are what they were,
14 okay, and they're not -- they're not here challenging
15 the report, that there was something wrong with the
16 methodology or there was something wrong with the
17 research, the report was what it was, Wynder painted
18 those mouses and they got tumors. The issue is what
19 the -- what that means for the issue that this was
20 all done for, which is the relationship between
21 smoking and -- and health.

22 Q. What's the proper conclusion or valid conclusion
23 that can be drawn from the research.

24 A. Right.

25 (Reporter interruption.)

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1 Q. And certainly of the right or valid conclusion
2 that could be drawn from the research was that
3 smoking caused lung cancer, all smokers that were
4 rationale would be very concerned by that situation;
5 true?

6 MR. SCHWARTZBAUER: Objection.

7 A. Well I don't -- I may have answered this yes in
8 the past, and I've been thinking about it because I
9 don't know what you mean by very concerned because we
10 have a situation now where we know overwhelmingly
11 smokers do believe that smoking is -- causes lung
12 cancer and lots of other bad things, but they
13 continue to smoke, and to take it up, and including
14 all of us who have very rationale and very
15 intelligent friends who as good as any layman
16 understand the apparent risk and choose --
17 nonetheless choose that they prefer to smoke.

18 Q. But less do that now than did that in 1953;
19 correct?

20 A. Yes. Less people drink cold milk than in 1953,
21 too but --

22 Q. But certainly in 1953 someone who was a smoker
23 would have been very legitimately concerned about the
24 prospect that smoking caused lung cancer was in fact
25 a valid conclusion to draw from the scientific

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1 research; true?

2 A. That that was a valid conclusion?

3 Q. They would have been very concerned if that

4 turned out to be a valid conclusion?

5 A. They would be -- I presume most people would be

6 quite interested whether or not that was true.

7 Q. All right. So rationally people who were

8 smoking at that time would have been very interested

9 in trying to determine whether the conclusion that

10 smoking caused lung cancer was valid or not?

11 A. I think they would have been interested in what

12 the answer to that question was, if there was an

13 answer.

14 Q. And in this Frank Statement the cigarette

15 companies that sponsored the ad suggested that, first

16 of all, they didn't believe the conclusion was valid;

17 true?

18 MR. SCHWARTZBAUER: Objection.

19 A. They stated that they believed that their

20 products are not injurious to health. That's what it

21 says in this Frank Statement.

22 Q. And that statement by the cigarette

23 manufacturers is inconsistent with the conclusion

24 that smoking causes lung cancer; true?

25 MR. SCHWARTZBAUER: Objection.

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1 A. Yes, those two conclusions are inconsistent.

2 Q. If smoking is not injurious to health, smoking
3 certainly doesn't cause lung cancer?

4 A. There's some -- I mean there's some fine points
5 there about, you know, about the -- the level of
6 causation, how many cases you would cause, but --

7 Q. But certainly anyone would regard lung cancer as
8 injurious to health?

9 A. I assume.

10 Q. And if smoking wasn't injurious to health, then
11 it wouldn't be causing something like lung cancer?

12 A. Not with any substantial frequency.

13 Q. Or with any frequency, if it's --

14 A. Well --

15 Q. -- it's not injurious to health; true?

16 A. Well we now realize that almost anything is
17 injurious to health to some people in some
18 circumstances, so it's a sort of background noise of
19 living. What's noted about lung cancer is the
20 frequency is high and it's now believed that a
21 significant cannot part of the frequency is due to
22 smoking so it's not background noise.

23 Q. But plainly, Dr. Scheffman, if a given product
24 is not injurious to health as a flat out statement,
25 then that product is not going to cause a health

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1 problem in the sense of being an indispensable link
2 in some chain of events that produces the health
3 problem?

4 MR. SCHWARTZBAUER: Objection.

5 Q. True?

6 MR. SCHWARTZBAUER: Objection.

7 A. One, the statement is -- doesn't state as to
8 what's true, in fact it says what they -- what they
9 state the belief is, which is an important qualifier.

10 Q. Yes, but if what they believe were true --

11 A. And second -- and second, there really is this
12 issue about the frequency. Lots -- you know, as far
13 as we can tell probably lots of things for some
14 people in some circumstances lead to -- some lead to
15 lung cancer probably, something causes, you know,
16 lung cancer, there's so many things that we just
17 don't know all the things there are. It's that --
18 what's notable here is that again that apparently
19 cigarettes cause that in a big enough frequency, it's
20 not background noise, and it's -- it rises to a
21 serious issue obviously.

22 Q. And that's something that you've believed for a
23 long, long time in your life, that cigarette smoking
24 was one of the contributing factors to lung cancer?

25 A. Yes. Well, no, I'm sorry, because one, we know

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1 people that get lung cancer who never smoke. You
2 know, it's a risk factor, which we know. Again, you
3 know, we know -- I know my family has smoked all
4 their life, they have never gotten lung cancer. I
5 know other people who have gotten lung cancer, so
6 it's a -- it's is a risk factor, which --

7 Q. Recognizing --

8 A. Significantly.

9 Q. Recognizing that some people have been diagnosed
10 with lung cancer who didn't themselves ever smoke a
11 cigarette, is it still not your belief that a very
12 significant proportion of those individuals who do
13 contract lung cancer contracted it in part because of
14 their smoking?

15 MR. SCHWARTZBAUER: Objection.

16 MR. EISZNER: Objection, competence.

17 A. I don't know the numbers. I -- my belief is
18 that people who choose to smoke are taking a not
19 insignificant risk that they will end up getting lung
20 cancer.

21 Q. And you believe they're taking a not
22 insignificant risk because in some given number of
23 cases smoking cigarettes is a contributing factor to
24 lung cancer?

25 MR. SCHWARTZBAUER: Objection.

1 A. Seems -- seems best we know, that's probably
2 true.

3 Q. But going back to the Frank Statement, not only
4 did the sponsors of the ad offer their opinion that
5 disputed the validity of the conclusion that lung
6 caused lung cancer, the sponsors also cited some
7 unidentified other eminent doctors and research
8 scientists who apparently didn't accept that
9 conclusion either; true?

10 MR. SCHWARTZBAUER: Objection.

11 A. I don't know. If you're referring to the third
12 paragraph that they think they're -- there are others
13 that have questioned the claimed significance of
14 these experiments; that is, not that there is not --
15 these stats aren't reliable, but whether -- what
16 interpretation you'd place on those experiments, yes.

17 Q. Actually there are -- there are a number of
18 paragraphs that deal with that subject matter;
19 correct?

20 A. Well it's some --

21 Q. It starts in the third paragraph on the left
22 column?

23 A. Yes.

24 Q. And so the sponsors point out that while recent
25 reports have been given wide publicity with respect

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1 to the theory that smoking causes lung cancer, a
2 number of other doctors and scientists don't accept
3 that conclusion?

4 MR. SCHWARTZBAUER: Objection.

5 Q. Correct?

6 A. No, I think the language speaks for itself, they
7 have publicly questioned the claimed significance of
8 these experiments.

9 Q. Which would indicate to anybody reading this ad
10 that those other doctors and scientists don't agree
11 with the conclusion that smoking causes lung cancer;
12 correct?

13 MR. SCHWARTZBAUER: Objection.

14 A. No, that's not what it says.

15 Q. Well if they question the significance of the
16 experiments that led to the conclusion, then they
17 would obviously be questioning the conclusion itself;
18 true?

19 MR. EISZNER: Objection; vague.

20 MR. SCHWARTZBAUER: Objection.

21 A. No. I think this is an interesting case because
22 I think the medical community if you look now you
23 would -- I think as I understand the science, if you
24 -- if you were to assess why the Surgeon General and
25 others in the medical community as a large believe

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1 now that smoking is a significant risk factor, it
2 mostly does not have to do with those mouse painting
3 experiments which as far as I understand now are not
4 thought to be -- to shed much light on things, that
5 the other evidence has been developed, so I think in
6 a way what the medical -- what we have in retrospect
7 is the medical community probably as a whole probably
8 agrees that those Wynder studies in fact weren't the
9 proof because no one much believes that those mouse
10 painting studies any more tell you anything.

11 Q. But in 1953 there was more than mouse painting
12 studies that were widely publicized in connection
13 with smoking causing disease; correct?

14 A. Yeah, but the thing that kicked this off was the
15 mouse studies, the statistical result, and then
16 shortly -- relatively shortly after, within the next
17 year or two, was this study by very credible people
18 which for the first time seemed to indicate, you
19 know, biological evidence that would support the
20 statistical study, support the possible conclusions
21 of the statistical study. And I am saying that my
22 understanding of the science is in fact this -- this
23 would be true today, that the medical community would
24 largely say that isn't the reason, it's not the
25 Wynder studies why we believe that smoking is related

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1 to heart -- related to lung cancer.

2 Q. But certainly the sponsors of the study were
3 attempting to call attention to other unidentified --
4 other unidentified members of the scientific
5 community that allegedly questioned the reliability
6 of conclusions from mice studies that linked smoking
7 to lung cancer?

8 MR. SCHWARTZBAUER: Objection.

9 Q. True?

10 A. I think you misstated. I think you said study
11 and I think you meant sponsors of the ad.

12 Q. Let me state it again then.

13 A. Yeah.

14 Q. The sponsors of the ad made it a point to call
15 to the attention of smokers that there were allegedly
16 some other scientists who disagreed with any
17 conclusion that the studies involving mice
18 established a cause and effect relationship between
19 smoking and lung cancer?

20 MR. SCHWARTZBAUER: Objection.

21 A. Well I can only -- I can't say more than this:
22 that this language is very explicit here and it's not
23 what you said, so. The ad says that they have
24 publicly questioned the claimed significance of these
25 experiments, and it's not -- it's not necessarily

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1 what was claimed by the researchers in the
2 experiments, it's what's been -- what was claimed in
3 the -- in the public -- in public discussion about
4 what the implications of those studies were.

5 Q. But the claimed significance of the mice
6 experiments was that smoking was in some way linked
7 with lung cancer in human beings; correct?

8 MR. SCHWARTZBAUER: Objection.

9 A. I think that's a fair assumption.

10 Q. And then in the left-hand column under item
11 number 3 the sponsors indicate that there is no proof
12 that cigarette smoking -- or excuse me. With
13 reference to item number 4 on the left-hand column,
14 the sponsors state "That statistics purporting to
15 link cigarette smoking with the disease could apply
16 with equal force to any one of many other aspects of
17 modern life. Indeed the validity of the statistics
18 themselves is questioned by numerous scientists."

19 Did I read that correctly?

20 A. Yes.

21 Q. So the sponsors are also suggesting to cigarette
22 smokers that the epidemiological studies that link
23 cigarette smoking with disease may well be invalid?

24 A. Yes.

25 Q. Now --

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1 A. Well let me recant, please, because I answered
2 too quickly.

3 MR. SCHWARTZBAUER: Then let me put an
4 objection in before your answer.

5 A. Again, what's being -- what's being challenged
6 here in the ad was -- is the interpretation of the
7 statistical studies, what are the statistical studies
8 that appear -- appeared to link cigarette smoking
9 with lung cancer, whether that -- whether that --
10 whether that was a valid scientific inference.

11 Q. And the interpretation of the studies in terms
12 of its validity is another way of describing the
13 conclusions that one might reasonably draw from the
14 study; correct?

15 MR. SCHWARTZBAUER: Objection.

16 Q. If we attempt to interpret a study, we're
17 talking about what conclusions can reasonably be
18 drawn from the study; true?

19 MR. SCHWARTZBAUER: Objection.

20 A. I'm sorry. I'm getting lost in this.

21 MR. GILL: Can you read it back.

22 (The record was read by the reporter.)

23 A. In the -- that could be in the broadest sense of
24 interpretation, yes.

25 Q. And so any smoker in early 1954 who may have

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1 been concerned as to the validity of interpretations
2 of mice skin painting studies or epidemiological
3 studies that were interpreted to link smoking with
4 lung cancer would find in reading this ad that, first
5 of all, the cigarette manufacturers didn't agree with
6 those conclusions; correct?

7 MR. SCHWARTZBAUER: Objection.

8 A. No, they say that -- again, we got to be careful
9 in distinguishing the conclusions of the studies from
10 interpretations people made of the studies; and two,
11 they are stating flatly that it is their belief that
12 the products are not injurious -- their products are
13 not injurious to health.

14 Q. But in terms of an interpretation of a study
15 being a set of conclusions as to what the study
16 means, certainly the sponsors of this ad were
17 indicating to smokers that they did not agree with
18 any conclusion that sought to link smoking with lung
19 cancer; true?

20 MR. SCHWARTZBAUER: Objection.

21 A. I don't think so. I -- I count put it that
22 way. That they -- the ad says that there are these
23 studies, they're reputable studies, there are other
24 reputable people that raised questions about those
25 studies, and we believe -- we are aware of all this

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1 stuff, and we -- and we believe that our products are
2 not injurious, and so the people that do believe --
3 that did believe at that point that on the basis of
4 studies or whatever that smoking caused lung cancer,
5 they -- their -- they disagree with their belief.

6 Q. The sponsors of the ad would disagree with that
7 belief?

8 A. Yes.

9 Q. And assumedly, the sponsors -- the manufacturers
10 of the given product would be expected to have at
11 least a fair amount of information at their disposal
12 as to the relative safety of the product; true?

13 MR. SCHWARTZBAUER: Objection.

14 A. I -- on these situations usually no.

15 Q. Usually no?

16 A. When something like this arises, when some
17 information comes out that's unexpected, someone does
18 some study, it's often the case that, you know, this
19 information comes from outside the company that they
20 had no idea. Apple producers had no idea about Alar,
21 I think if I recall right Proctor & Gamble had no
22 idea about toxic shock syndrome before that hit the
23 news. And various other situations. The news comes
24 out that -- that challenges the safety of the
25 product.

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1 Q. Are you suggesting that prior to January of 1954
2 -- Strike that.

3 Prior to the issuance of the Doll
4 epidemiological study, the Hammond epidemiological
5 study in the early 50s, and the Wynder skin painting
6 study in 1953 that the management of tobacco
7 companies had no information available to them with
8 respect to the safety of their product?

9 A. I don't think they had any information as to
10 whether mouse skin painting would cause tumors and
11 what you might be able to interpret, what -- what
12 interpretation that might have, and I don't know that
13 they did any statistical epidemiological research.

14 Q. Assuming that the cigarette manufacturers didn't
15 do any skin painting studies with mouse -- with mice
16 or any epidemiological studies prior to the early
17 50s, would you nevertheless be of the view that the
18 manufacturers would have had little or no information
19 on the subject of whether cigarette smoking caused
20 health problems?

21 MR. EISZNER: Objection.

22 A. I -- I think they had the information pretty
23 much that everyone else had. They had been through
24 -- this was certainly the most serious thing that
25 had happened in the history of the industry up to

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1 that point, but there had been other health issues
2 that popped up and other studies, certainly not ones
3 that caused such a big -- as big a splash, but as
4 they -- as they point out in the second -- in the
5 beginning of the second column, look, this stuff has
6 been around forever, people have been smoking, you
7 know, and there hasn't been -- although there have
8 been long concern about health effects of smoking
9 going back for a very long time, there wasn't any, to
10 coin a phrase, "smoking gun" that you could point to
11 of -- you know, that smoking would cause particular
12 problems, particularly lung cancer.

13 Q. But prior to January of 1954 is it your opinion
14 that each of the sponsors of this ad as an
15 organizational entity likely had no more information
16 regarding the potential relationship between smoking
17 and ill health than the average individual who was
18 out there in America buying cigarettes at the corner
19 grocery store and smoking them?

20 MR. SCHWARTZBAUER: Objection.

21 A. No, I think they probably -- but I think as what
22 -- what I was saying, no, that they probably didn't
23 -- in terms of anything that was significant they
24 probably didn't have any significant information not
25 possessed by researchers on smoking and health, and

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1 they discovered the researchers on smoking and health
2 had some very significant information that they
3 didn't have.

4 Q. I take it you are assuming that each of these
5 sponsoring cigarettes companies had some type of
6 Research and Development department within the
7 company?

8 A. Yes.

9 Q. And are you assuming that none of those Research
10 and Development departments had found any data or
11 information over the years that suggested to those
12 companies that their cigarette products caused health
13 problems?

14 A. I don't know what "caused" means here. What do
15 you mean by "caused"?

16 Q. A contributing factor that is in part the agent
17 that produces a given effect, such as poor health?

18 A. I don't know of any evidence that the -- that
19 the companies had any, you know, scientific studies
20 in-house that would be anything like the Wynder study
21 and the implications people might draw at that point.

22 Q. Are you aware of any evidence that any of the
23 cigarette companies had prior to January of 1954
24 internal evidence that their products produced
25 pathological changes in smokers?

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1 A. Well, there -- cigarettes had always -- had for
2 a long time been -- there have been health issues
3 connected with cigarettes, and the companies had done
4 -- various companies had done certain sorts of
5 research. I can think of a situation where R.J.R. --
6 I don't know whether it -- it's based on its research
7 or publicly-available research -- solicited doctors
8 on the basis of the apparent effects of nicotine on
9 -- on people's heart rates.

10 Q. Solicited doctors to do what, endorse Camels?

11 A. Probably that was the intent, but it was -- the
12 solicitation pointed out that nicotine is -- had been
13 shown to elevate heart rates and that Camels was
14 constructed as a relatively slowing -- slower burning
15 cigarette, if I recall right, and so nicotine
16 consumption was at a slower rate smoking Camels and
17 this might be a good thing for you to think about if
18 you're -- if you're dealing with patients who are
19 trying to modify their smoking behavior.

20 Q. In fact in addition to increasing heart rate,
21 that information demonstrated that nicotine
22 significantly raised blood pressure as well; true?

23 A. I don't remember -- I -- it was one or the other
24 or both.

25 Q. And certainly neither of those situations would

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1 be a good think over any type of sustained time frame
2 for an individual; true?

3 MR. EISZNER: Objection.

4 A. I don't know whether that's true.

5 Q. You don't know whether increasing blood pressure
6 over a sustained time period is a good or a bad thing
7 for an individual?

8 MR. SCHWARTZBAUER: Objection.

9 A. As to whether that was -- I mean it certainly
10 can be quite important apparently for some
11 individuals with high blood pressure or -- or other
12 maladies. I don't know how important it is -- the ad
13 was pointing out, well, if you have some patients
14 like this then this might be useful for you to know
15 that -- that if they smoke our cigarette, if you're
16 concerned about them elevating blood pressure or
17 heart rate, whichever, or both, you know, ours might
18 be a better product for them.

19 Q. And certainly if the nicotine in a cigarette
20 pushed somebody's blood pressure from the average
21 range to the high range, that would not be a good
22 thing for that individual?

23 MR. SCHWARTZBAUER: Objection.

24 A. I'm not a medical expert, so I don't know.

25 Q. Isn't that your lay person's understanding?

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1 MR. SCHWARTZBAUER: Objection.

2 A. I don't know what not being a good thing is. I
3 elevate my heart rate every time I run or something
4 like that, so I just don't know.

5 Q. Do you ever have your blood pressure checked,
6 Dr. Scheffman?

7 A. Occasionally.

8 Q. Has any doctor ever suggested to you that having
9 your blood pressure go beyond certain thresholds on a
10 consistent basis could cause health problems for you?

11 A. Not personally, because I don't have -- I have
12 low blood pressure. Low blood pressure. So --

13 Q. Have you ever come across that information
14 anywhere in your adult life, that high blood pressure
15 is something to be avoided if at all possible?

16 A. But I -- I don't from -- in that case, despite
17 that, even -- mainly I'm not an expert; and two, I
18 really have no personal experience with that so I
19 don't really know. I -- I'm not disagreeing. I've
20 heard that high blood pressure can be a problem,
21 health problem, but I don't know more than that.

22 Q. Well assuming that high blood pressure can
23 indeed be a health problem, and assuming further that
24 nicotine raises blood pressure and that tobacco
25 companies knew that as of January 1954, the statement

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1 that we believe cigarettes are not injurious to
2 health may not have been true?

3 MR. SCHWARTZBAUER: Objection.

4 Q. Correct?

5 MR. SCHWARTZBAUER: Objection.

6 A. I don't think that's right. I don't think
7 that's a proper inference.

8 Q. Well if cigarettes caused high blood pressure
9 and if high blood pressure could be injurious to
10 health, then cigarettes could be injurious to health;
11 true?

12 A. I didn't -- I don't know that cigarettes caused
13 high blood pressure. I don't think it's reported in
14 this ad that said -- and I said heart rate, you said
15 blood pressure. All I know is this ad that said it
16 elevates something, and it -- actually the ad didn't
17 deal with that, I don't know what the ad -- the ad --
18 the ad specifically, the tag-in on that ad said our
19 product might work better if you're trying to get
20 your patient to modify his smoking behavior.

21 Q. And it -- was this ad something that was a -- a
22 handout to doctors or was it, as you understood it,
23 appearing in some publication where it might be read
24 by anybody, including doctors?

25 A. It was an ad. I -- I don't know whether it was

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1 -- it looked like an ad that would be in -- you
2 know, it doesn't look like an ad that would have been
3 in JAMA or something, but I don't know where it was.

4 Q. But an ad in a medical journal of some kind?

5 A. I don't know whether -- where the ad was placed.

6 Q. But if a manufacturer was making the
7 representation that it believed its products were not
8 injurious to health, someone reading that ad who used
9 the products would likely assume that the
10 manufacturers had some basis upon which to make that
11 representation; true?

12 MR. SCHWARTZBAUER: Objection.

13 A. Well the ad was directed at doctors so I guess
14 --

15 Q. I'm going back to the Frank Statement.

16 A. Oh, this, okay. I'm sorry. You'll have to ask
17 the question again.

18 Q. If cigarette manufacturers were representing to
19 smokers in the Frank Statement that the manufacturers
20 believed their products were not injurious to health,
21 it would have been reasonable for the smokers to
22 assume that the manufacturers had some basis to make
23 that statement; true?

24 MR. SCHWARTZBAUER: Objection.

25 A. No, it's sort of reverse logic. That's a sort

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1 of Kafka-esque logic, which is they don't -- didn't
2 have -- again their -- as I understand their
3 position, for 300 years people had been using this
4 product, there have been various controversies,
5 nothing ever proved, they continued to believe, as we
6 do, and that's the way FDA regulation works in other
7 things like this, if you have something that has
8 existed for a long time, there's a presumption that
9 it's safe unless some new evidence comes up
10 conclusively showing it's not. That's why cigarettes
11 aren't regulated as a drug.

12 Q. So is it -- would it be your interpretation that
13 when the cigarette manufacturers claimed to believe
14 that their products were not injurious to health,
15 smokers who read that ad would have reacted by
16 scoffing at the idea that the cigarette manufacturers
17 would actually know whether or not their products
18 were injurious to health?

19 MR. SCHWARTZBAUER: Objection.

20 A. I didn't think I said anything at all related to
21 that statement.

22 Q. For instance, if the cigarette manufacturers for
23 some reason took out an ad in 1954 in which they
24 collectively stated that they believed that Ford
25 automobiles were safe to drive, somebody owning a car

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1 or even a Ford car might well have -- have thought,
2 what would these people know about it, they make
3 cigarettes, not cars. True?

4 A. Possible.

5 Q. But if, on the other hand, the makers of
6 cigarettes are suggesting that they have some
7 information which reasonably leads them to believe
8 that their products are not injurious to health,
9 people using those products might well assume that
10 they had some basis to take that position?

11 A. Well, what's interesting about this ad, if we're
12 going to pursue this line, is that they in fact don't
13 at all imply that they have any information at all
14 themselves. The only information they know is what
15 various external experts' opinions are about the
16 interpretation of various -- various studies.

17 Q. The sponsors of the ad certainly don't point to
18 any information they had in support of their
19 representation that their products are not injurious
20 to health; true?

21 MR. SCHWARTZBAUER: Objection.

22 A. Any information they -- any -- I don't see
23 anything in the ad where they point to any or allude
24 to any information that they possess proprietarily.

25 Q. If -- if they have such information that would

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1 support the representation that smoking is not
2 injurious to health, they certainly don't disclose it
3 in this ad; correct?

4 A. But I said, that's Kafka-esque. You wouldn't
5 expect someone -- I don't think major dairies have
6 studies in their files proving that milk is probably
7 safe.

8 Q. Well they might well have studies in their files
9 which conclude that the milk is not poisonous, that
10 the milk is not going to cause dysentery, any number
11 of things they may well have; correct?

12 A. I think they -- no, I don't think they'd have
13 studies at all. I think they would have -- they
14 would in the course of business make sure that they
15 were producing milk that didn't have dysentery or
16 carry dysentery or other disease in it.

17 Q. Well wouldn't you expect that manufacturers that
18 are combining various ingredients into products that
19 are to be ingested by humans would make some effort
20 to determine whether the combination of components
21 might cause a problem for human ingestion?

22 A. Well companies in recent years, including the
23 cigarette companies, do much, much more of that sort
24 of thing with greater vigor than they were doing in
25 1953.

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1 Q. But you don't have any idea what they were doing
2 in 1953, do you?

3 A. As to what?

4 Q. As to conducting any research to determine
5 whether or not the components of cigarettes were
6 likely to cause problems for human beings who smoke
7 those products?

8 A. We -- well, we know in retrospect that that
9 would have been extremely difficult to do because it
10 required hundreds of millions of dollars and many
11 scientists across the world to reach the conclusion
12 that the Surgeon General reached in 1964. Two,
13 again, companies are not -- if you've been producing
14 a product for a long time and -- and no one's pointed
15 to some significant problem -- I don't think that
16 General Mills is spending lots of money trying to
17 figure out whether there's problems with wheat or
18 other things that they normally -- that they for a
19 long time have used in Cheerios. Now if they add
20 something new to Cheerios, as any manufacturer these
21 days, they'd go through certain procedures, but --
22 Q. So that certain procedures would have been
23 pursued at least sometime in the formulation of the
24 product, maybe not lately, because there aren't any
25 questions, but at some point in time, a

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1 manufacturer --

2 A. Not --

3 Q. -- would have pursued some research with regard
4 to the formulation of its product?

5 A. Not --

6 MR. SCHWARTZBAUER: Objection.

7 MR. EISZNER: Objection.

8 A. Not in 1953, not in the case -- not with the
9 state of regulation and science and manufacturing
10 technology in 1953 I don't think.

11 Q. All right. So if at the time of trial in this
12 case we showed you documents that related to
13 information that smoking -- that cigarette companies
14 had as of January 1954 with respect to potential
15 harmful effects of smoking, you would be absolutely
16 surprised to find that such information existed?

17 A. No. I think -- I think there's hints from the
18 documents we've seen, I may have even seen documents
19 that there are some things like that that could at
20 least be characterized that way. I didn't say they
21 weren't doing anything.

22 Q. But are you indicating that it would have been
23 unlikely for smokers reading this ad in January 1954
24 to assume that the cigarette manufacturers had some
25 reasonable basis in terms of research, internal

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1 research to offer the representation that their
2 products were not injurious to health?

3 MR. SCHWARTZBAUER: Objection.

4 A. No.

5 Q. And if the smokers who read this ad assumed that
6 the cigarette manufacturers had a reasonable basis to
7 tell them that they believed cigarettes were not
8 injurious to health, that would have been reassuring
9 to smokers who wanted to believe that the conclusions
10 in the studies that linked smoking to lung cancer
11 were invalid?

12 MR. SCHWARTZBAUER: Objection.

13 Q. True?

14 MR. SCHWARTZBAUER: Objection.

15 A. No, I think this ad on its face makes clear what
16 the claim is, that something -- that people would
17 take away, which is there have been these studies,
18 they have raised this controversy, we believe -- we,
19 the companies, believe it is a controversy because
20 there are people -- there are credible people that
21 say this interpretation is questionable, and our
22 basic belief is that we believe our product's not
23 injurious and actually the main thing we're offering
24 for that is that we've been doing this for three
25 hundred years, you know, this product, and these

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1 controversies have arisen periodically, and every
2 time in the past they've turned out not to be
3 validated, and we, you know -- our guess is that this
4 is another one of those.

5 Q. So keep smoking.

6 MR. SCHWARTZBAUER: Objection. If that's a
7 question.

8 Q. True?

9 A. Well that -- we've -- we've already talked about
10 that, about the main purpose of the ad.

11 Q. But everything that you just stated in terms of
12 your understanding of what this ad seeks to achieve
13 is toward the goal of maintaining consumption of
14 cigarette smoking --

15 A. I disagree.

16 Q. -- until further information is available?

17 A. I disagree, and we went through that. I
18 disagreed with that.

19 Q. Well it certainly -- the import of this ad is
20 certainly not to suggest that it would be prudent to
21 stop smoking until these questions are answered, is
22 it?

23 MR. SCHWARTZBAUER: Objection.

24 A. The ad is not trying to convey that message.

25 Q. It tries to convey the opposite message; does it

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1 not?

2 MR. SCHWARTZBAUER: Same objection.

3 Q. No need to change your smoking habits based upon
4 these recent reports because many people feel that
5 the conclusions that have been drawn from those
6 reports are invalid?

7 MR. SCHWARTZBAUER: Objection.

8 A. There -- there is not a hint anywhere in the
9 explicit language of this -- of that message. Now
10 you may infer that from it, but that's -- there's
11 nothing in this message about that, don't be tricked,
12 don't give up this, which -- don't give up this
13 product which you enjoy just because these scientists
14 are having this debate.

15 Q. Well it would be very reasonable for smokers
16 reading this ad to infer that they ought not to give
17 up their smoking simply because some studies have
18 supposedly linked smoking to lung cancer?

19 MR. SCHWARTZBAUER: Objection.

20 Q. True?

21 MR. SCHWARTZBAUER: Objection.

22 A. I mean I think we've covered this a lot. I
23 disagree. I mean what -- people would take away
24 different messages from this perhaps and give a
25 different weighting. What we do know is that after

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1 this ad was widely circulated cigarettes consumption
2 fell dramatically, the most dramatic fall in the
3 history of the industry.

4 Q. And of course what we don't know is how much
5 further it may have fallen in the absence of this ad
6 campaign?

7 A. That's true.

8 Q. And in terms that the credible sources that the
9 sponsors of the ad were citing to cigarette smokers
10 as taking issue with the conclusion that smoking
11 caused lung cancer, one of the credible sources was
12 the cigarette industry itself; correct?

13 MR. SCHWARTZBAUER: Objection?

14 A. They stated their belief and offered a basis for
15 that belief.

16 Q. As a supposedly credible source; true?

17 A. Well, credible -- well, no, they're not -- they
18 don't say anything about -- they claim all these
19 other folks are credible, and not surprising, they
20 don't claim any credibility -- self assess their
21 credibility. They say the cigarette companies or
22 people involved in this industry, it's our belief
23 that these products aren't injurious and here's, you
24 know, a sort of summary, summary reason why we think
25 that's true.

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1 Q. And assumedly if the cigarette companies' belief
2 wasn't significant it wouldn't have been set forth in
3 the ad?

4 MR. SCHWARTZBAUER: Objection.

5 A. Significant to who?

6 Q. To the smokers.

7 A. No, I -- I absolutely disagree. I think it's
8 significant that this is what the cigarette companies
9 believed and that it's important that they
10 communicated to the public at large, that they
11 communicated to their employees their belief.

12 Q. But if the belief of the cigarette companies
13 that smoking was not injurious to health was not a
14 piece of significant information, assumedly it
15 wouldn't have made it into the ad; correct?

16 A. I think it's quite significant, but it's
17 significant for lots of reasons other than what
18 you're trying to communicate to smokers and affect
19 their -- their purchase behavior.

20 Q. But certainly one of the reasons of significance
21 to smokers of the industries' supposed belief would
22 be that if the industry that makes the cigarettes
23 believes they're safe, it's probably all right for me
24 to continue to smoke them?

25 A. Well I don't --

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1 MR. SCHWARTZBAUER: Objection.

2 A. I don't -- I don't see the basis of that. I
3 mean I don't think -- unfortunately we don't have
4 research, very definitive research going back that
5 far. Now I think we do know from careful market
6 research that consumers these days would be highly
7 skeptical of that sort of statement. I don't know
8 that they wouldn't be then.

9 Q. And even if some of them would have been then,
10 certainly from the standpoint of the sponsors who put
11 this ad together they may well have felt that
12 alluding to their belief that smoking didn't cause
13 health problems that that would be reassuring to
14 smokers?

15 MR. SCHWARTZBAUER: Objection.

16 A. Well that's about the -- it's about the most
17 modest sort of reassurance you could give. I mean
18 really. Just think of what you could do compared to
19 what other companies have done in a similar situation
20 to say We believe it's okay, and the main -- the
21 reason we believe it's okay is that, you know, this
22 product has existed for a long time and we've had
23 these scares before and they've never be proved, we
24 think it's another one of those.

25 Q. Well let's look at a piece of reassurance in the

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1 paragraph just above the one we've been talking
2 about, the paragraph that deals with a pledge to
3 accept an interest in people's health as a basic
4 responsibility paramount to every other consideration
5 in our business. Do you see that?

6 A. Yes.

7 Q. Now do you believe that would have been
8 reassuring to smokers, to know that the cigarette
9 industry was going to place the health of the smokers
10 paramount to every other consideration of the tobacco
11 companies' business?

12 MR. SCHWARTZBAUER: Objection.

13 THE WITNESS: What was the predicate to the
14 statement?

15 (The record was read by the reporter.)

16 A. I don't know how much reassurance. I mean it's
17 an empirical matter as to whether -- how much
18 reassurance people would have received from that.

19 Q. Well this is a form of a pledge to smokers; is
20 it not? That would be a reasonable interpretation of
21 this language?

22 MR. SCHWARTZBAUER: Objection.

23 A. I don't think it's a pledge. They made -- other
24 places they use the word "pledge". They -- it's --
25 the language is what it is, which is they -- they --

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1 that people's health is their basic responsibility,
2 it's paramount to every other consideration.

3 Q. And when they say "we accept" they could just as
4 easily have said "we pledge an interest in people's
5 health as a basic responsibility," --

6 MR. SCHWARTZBAUER: Objection.

7 Q. -- "paramount to all others"; true?

8 A. Well I don't think it's a matter of English.

9 "Accept" and "pledge" aren't synonyms, so I think it
10 is -- again it is what it is, it says "they accept".

11 Q. Well in that context they would be synonyms;
12 would they not?

13 MR. SCHWARTZBAUER: Objection.

14 A. I don't think so.

15 THE WITNESS: I'd be ready for a break
16 pretty soon.

17 MR. GILL: Let's just finish this
18 paragraph.

19 BY MR. GILL:

20 Q. If that statement were true, that the cigarette
21 companies were going to put the health of the smokers
22 above all other interests in their business, that
23 would be good news for the smokers; true?

24 MR. SCHWARTZBAUER: Objection.

25 MR. EISZNER: Objection.

1 A. Sounds good. I don't know what it means, but --

2 Q. Well, for instance, it certainly would mean that
3 they would be putting the health of smokers in a
4 position paramount to the companies' profits;
5 correct?

6 MR. SCHWARTZBAUER: Objection.

7 Q. Paramount to the economic interests of these
8 companies?

9 MR. SCHWARTZBAUER: Same objection.

10 MR. EISZNER: Objection.

11 A. That's certainly a fair interpretation of the
12 statement, but I think the reality is we don't know
13 what that mean.

14 Q. But certainly businesses tend to place very
15 significant importance on their economic interests;
16 do they not, on their profitability?

17 A. Yes.

18 Q. And if a business is -- if a business were to
19 pledge to its consumers that it would put their
20 health above the economic interests of that business,
21 that would be very beneficial to the consumers if it
22 were true?

23 MR. SCHWARTZBAUER: Objection.

24 Q. Correct?

25 A. I don't know. I'd need to know -- it would

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1 depend on the situation.

2 Q. Well in this situation if the conclusion that
3 smoking causes lung cancer is valid, a number of the
4 smokers are going to die if they keep smoking, aren't
5 they?

6 A. Yes.

7 Q. So it would be a matter of extreme importance to
8 them whether this -- this conclusion is valid or not?

9 MR. SCHWARTZBAUER: Objection.

10 A. I'm saying it doesn't -- that in fact is the
11 situation that we're in now. And I think -- the very
12 difficult question is since it's widely accepted even
13 within the cigarette companies that that conclusion
14 is true, what do you do about it?

15 Q. And what's your basis --

16 A. And if I say that it's paramount, what does it
17 mean? I mean that's a very -- that's a deep
18 question. Does that mean well I won't produce this
19 product any more? Is that what I mean by paramount?
20 Is that what we want them to do? Not even David
21 Kessler wants them to do that. It's very difficult,
22 it's a very, very difficult issue. What turned out
23 to be apparently true that wasn't clear in 1954, what
24 turned out to be widely believed by 1964 is at that
25 point a very, very difficult business and ethical and

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1 moral issue for the companies, and for society, okay,
2 what are we going to do about it?

3 Q. Well certainly one of the things that the
4 companies could do about it is to let the consumers
5 of their products know that the information, data
6 establishing the causal link between smoking and
7 cancer and other diseases has now been established to
8 an overwhelming degree; true?

9 MR. SCHWARTZBAUER: Objection.

10 A. Well I don't think -- I mean that is -- since --
11 since 1964 and before that hundreds of millions of
12 dollars have been spent in the United States
13 communicating that message to people.

14 Q. But none of it by the cigarette industry itself;
15 correct?

16 A. Well the cigarette industry has these warning
17 labels on all their products.

18 Q. Only because they have been mandated by
19 Congress; correct?

20 MR. SCHWARTZBAUER: Objection.

21 A. Well, we know that it was mandated by Congress.
22 We don't know what would have happened --

23 Q. The cigarette companies have never endorsed the
24 necessity of providing those warnings, have they?

25 MR. SCHWARTZBAUER: Objection.

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1 A. I'm saying -- I'm just making a minor point that
2 we can't tell 20 years, 30 years later, however many
3 it is, what the position of the companies would have
4 been. We have warning labels in Britain and it's not
5 -- it's not explicitly because of regulation, and
6 other things, so I don't know what -- what would have
7 transpired. The companies weren't -- generally
8 weren't -- didn't favor warning labels at the time
9 that was being contemplated.

10 Q. But in the over 40 years since the Frank
11 Statement do you know of any admission by any
12 cigarette company, other than Liggett & Myers within
13 the last few months, that the scientific data
14 establishing the link between smoking and cancer and
15 heart disease is valid or reliable?

16 MR. EISZNER: Objection.

17 A. I don't know. I don't -- I don't recall any CEO
18 of any major cigarette company making that statement
19 prior to the Liggett CEO, if that's what it was, if I
20 recall.

21 Q. Do you know of anybody in a responsible position
22 from a cigarette company who has made such a
23 statement with the endorsement of that company's
24 management?

25 A. Well the statement here -- the problem is this

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1 statement here is a matter of science. It depends
2 what the statement is. I guess it's been more like
3 you have Cathy Ellis of Philip Morris saying that --
4 as a number of people have I think in the industry
5 for some time -- that they accept that the evidence
6 indicates that cigarettes are a significant risk
7 factor. You know, the problem is is when the
8 cigarette companies get up before Henry Waxman when
9 he's having hearings and he wants to ask them
10 different questions on purpose, most of which are
11 Does it cause? and as a matter -- as a matter of
12 science, as she points out, as a matter of science
13 you can take the position that causality has not been
14 established, because it's nothing like AIDS, we know
15 what causes AIDS. No one knows what causes -- what
16 the causal link is between smoking and lung cancer,
17 but we believe there's overwhelming evidence that
18 it's implicated, but we don't know the cause, that --
19 that we can say "cause," which is a precise
20 scientific term.

21 Q. But if someone dies of lung cancer, the
22 mechanism by which it happened is of little moment to
23 them; true?

24 MR. SCHWARTZBAUER: Objection.

25 A. Yes, that's true.

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1 Q. But if they knew that a given product caused
2 their lung cancer, that would be very useful
3 information; true?

4 MR. SCHWARTZBAUER: After they died?

5 Q. If -- if they knew about it at a point in time
6 when they could have prevented the lung cancer from
7 occurring by stopping the use of the product.

8 A. Well we know in all the tobacco litigation up to
9 now that people in fact do know. We know from
10 surveys people know that it's widely believed that
11 there's at least a link that maybe that people would
12 say it's causal.

13 Q. But nobody knows that information based upon
14 what the manufacturers of cigarettes have said;
15 correct?

16 MR. SCHWARTZBAUER: Objection.

17 A. Certainly the overwhelming source of that
18 information has not been the cigarette companies.

19 Q. And at a minimum if the cigarettes companies
20 were going to put the health of their smokers above
21 all other business interests of those companies, they
22 should have at least let the smokers know what they
23 knew about the potential hazards of smoking
24 cigarettes; true?

25 MR. SCHWARTZBAUER: Objection.

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1 A. Well, I don't -- I don't know what they knew of
2 great import that the scientific community didn't
3 know because that was mainly -- the scientific
4 community was the main source of the information.

5 Q. But the scientific community isn't making any
6 pledges in the Frank Statement, is it?

7 A. That's correct.

8 Q. These are pieces of information, pledges,
9 statements, representations that are being given by
10 the cigarette industry to smokers; correct?

11 A. All that's stated here is a belief, and we're
12 talking about 1954 where no one, no -- various people
13 have made conclusions, but the scientific community
14 as a whole and the Surgeon General and others had not
15 yet come to a conclusion until ten years later.

16 Q. But certainly the statement that "We accept an
17 interests in people's health as a basic
18 responsibility, paramount to every other
19 consideration in our business," that's a
20 representation; is it not?

21 MR. SCHWARTZBAUER: Objection.

22 A. Well a representation as to what?

23 Q. That's a representation by the industry that it
24 is going to place people's health above any other
25 consideration of its business, implicitly, including

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1 economic?

2 MR. SCHWARTZBAUER: Objection.

3 Q. Correct?

4 MR. SCHWARTZBAUER: Objection.

5 A. I don't know whether -- you're using
6 representation, I guess you could litigate in
7 contract whether it is. It's a statement. I agree
8 that the statement says that.

9 Q. And if the statement were true, then you --

10 A. If it didn't say "pledge," if you just stated
11 this as it is, but you said "accept".

12 Q. Let's take it as a statement, use your word, if
13 that's all it is. If the statement were true, you
14 would expect that cigarette companies would at least
15 let smokers know what the companies learned about the
16 potential hazards of smoking cigarettes if the
17 company was going to put the health of the smokers
18 above all its other interests; true?

19 MR. SCHWARTZBAUER: Objection.

20 A. No, I can't agree with that.

21 Q. You don't think that that would be at least a
22 minimum way of honoring this representation?

23 A. It's much -- that's much too vague and ambiguous
24 as to what -- you have to know what they knew and
25 what might be important to consumers and what effect

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1 that disclosure would have. That's just much too --
2 much too vague and ambiguous.

3 Q. But whatever the -- the smoking -- Strike that.

4 Whatever the cigarette companies either knew
5 then or ultimately learned about the health hazards
6 of smoking cigarettes, you would expect them to share
7 with smokers if they were going to honor this
8 representation; would you not?

9 A. Well I don't -- wait, well, okay, I should have
10 listened more carefully. I just don't see that at
11 all. You're -- you're inferring that this statement
12 would mean that you have a duty to disclose anything
13 that you know about health. I don't think that
14 that's at all true. I hope companies never do that.

15 Q. That you would have --

16 A. That would be --

17 Q. -- a duty to disclose anything that you learned
18 about the health hazards of the cigarette products
19 that you are selling as a company to the smokers, who
20 are the targets of this ad?

21 A. I would hope -- we would be -- if companies --
22 if all companies in the country abided by your
23 interpretation of this statement, we would be so
24 flooded with data that we couldn't process because
25 they have so much information, most of which is

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1 immaterial, that I -- I certainly wouldn't want that,
2 that would -- that would not benefit consumers or
3 society.

4 Q. What other industry do you know of that has ever
5 made a similar representation?

6 A. I -- this is a typical sort of representation by
7 companies in this situation, that we take foremost
8 your -- the health concern or the hazard, that's the
9 thing foremost in our minds.

10 Q. And that well place you're health above every
11 other consideration in our business?

12 A. I don't know that you'd have that explicit
13 language but that's typically -- that's often the
14 message --

15 Q. And --

16 A. -- and the intent of the company.

17 Q. And which such messages comes to your mind,
18 having done a study of this?

19 A. I think from -- I don't remember the specific
20 message. I think that that was the gist of it, in my
21 analysis, the intention of Proctor & Gamble in
22 dealing with Rely, which is this isn't about money,
23 this is about whether there's a real issue here.

24 Q. So Proctor & Gamble took Rely off the market?

25 A. Eventually.

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1 Q. Any other such instances that come to your mind?

2 A. Well, I have all the -- we're far afield from my
3 report, but we have lots of -- lots of examples in
4 the report, and they're just a tiny number -- percent
5 of, you know, the examples in history.

6 Q. Do any of the examples, even from your report,
7 come to your mind with respect to an industry
8 promising to place the health of their consumers
9 above every other consideration in their business?

10 A. I think that's -- I think that's the typical
11 message. Not -- not -- that would be the typical
12 message that would be conveyed, not this specific
13 message. What other message could it be? Say, look
14 we're going to do what we need to do to make money.
15 There wouldn't -- you'd never make that message. And
16 not just for PR purposes, because I think generally
17 companies in this situation would take the view that
18 that is the health issue, whether there's a real
19 health issue is the real issue, it's not the -- it's
20 not the bottom line. Is there a real health issue or
21 something and is there anything we can do about it
22 and what should we do about it?

23 Q. For instance, did Perrier make that promise with
24 regard to its problems about its water?

25 A. Well, I don't -- I think Perrier first said

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1 there is not a problem.

2 Q. All right. So Perrier first denied that there
3 even was a problem?

4 A. And -- well, no, I'm talking about situations
5 where -- because the typical situation of these
6 things is that it turns out there isn't a problem,
7 like Alar, so if you -- so if the companies believe
8 this is totally specious, this is not a problem, and
9 we know in retrospect apparently Perrier didn't have
10 a basis for that, but often in these situations there
11 really isn't a problem here.

12 Q. But there's definitely a problem here with
13 regard to smoking and health, isn't there?

14 MR. SCHWARTZBAUER: Objection.

15 A. We know -- we know there is now.

16 Q. And for all you know, Dr. Scheffman, the
17 cigarette companies knew there was a problem then?

18 MR. SCHWARTZBAUER: Objection.

19 Q. Correct?

20 A. No one, no, I think we -- I think we know that
21 no one knew in the sense that we -- the Surgeon
22 General's committee knew in 63 or whenever that there
23 was a problem. There wasn't the amount -- there
24 wasn't the scientific evidence mounted at that point
25 to know.

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1 Q. And once the scientific evidence was mounted by
2 the Surgeon General's task force, did the cigarette
3 companies at that point in time say, Well, now in the
4 face of this we're forced to agree, the evidence is
5 overwhelming?

6 A. No, because they didn't agree.

7 Q. Let's take a little break.

8 (Recess from 2:51 to 3:01 p.m.)

9 BY MR. GILL:

10 Q. Dr. Scheffman, would you look at the final
11 paragraph of the left-hand column. Do you see the
12 statement "We always have and always will cooperate
13 closely with those whose task it is to safeguard the
14 public health?"

15 A. Yes.

16 Q. Is it reasonable for smokers who read this ad to
17 assume that that was a pledge on the part of the
18 sponsors?

19 MR. SCHWARTZBAUER: Objection.

20 A. Again I don't -- they use "pledge" specifically
21 here in some places and no others, so I think I'm
22 most comfortable with the language is what it is. It
23 says that's what they've done in the past and that's
24 what they'll do in the future.

25 Q. But to the extent that "pledge" refers to a

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1 statement of intent, would you agree that the
2 statement "We always have and always will cooperate
3 closely with those whose task it is to safeguard the
4 public health" would be a pledge to that effect?

5 A. Well again I'm more comfortable.

6 Q. Is --

7 A. They use the word "pledge" when they're -- in
8 the context of something that they're going to do in
9 the future, which is relatively -- which is newer,
10 you know, in addition to what they've done in the
11 past, and this thing says what it says, that they
12 will do this in the future.

13 Q. From your perspective then unless the tobacco
14 manufacturers specifically used that term "pledge"
15 somewhere in this ad, anything they said would fall
16 short of a pledge?

17 A. Well I don't -- I don't know what -- I'm sure
18 you're asking -- keep asking the word "pledge"
19 because it has some significant legal meaning that I
20 don't understand, so that's -- I don't want to --
21 even though my opinion on that would be irrelevant, I
22 would think I am most comfortable just saying the
23 language is very clear as to what it is.

24 Q. Now the idea they're going to continue to
25 cooperate with those whose task it is to safeguard

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1 the public health, that would be consistent with the
2 idea that they're putting their -- their customers'
3 health above their own interests; correct?

4 MR. SCHWARTZBAUER: Objection.

5 Q. Above their own business interests.

6 A. It's not inconsistent with that.

7 Q. And then going to the column on the right, the
8 third paragraph down, there is a reference to what
9 the sponsors of the ad intend to do about the public
10 concern that's been aroused by the recent reports.
11 Do you see that?

12 A. Yes.

13 Q. And it points out three specific things that the
14 cigarettes companies are going to do; correct?

15 MR. SCHWARTZBAUER: Objection.

16 A. Well I think -- well, these are -- these are
17 enumerated but they're mainly going to do number 1,
18 and 2 are 3 are what the -- you know, more details
19 about what number 1 is going to involve.

20 Q. All right. And number 1 is they're pledging aid
21 and assistance to the research efforts into all
22 phases of tobacco use and health; correct?

23 A. Yes.

24 Q. And in addition to whatever they're doing
25 internally toward that goal, they're also going to

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1 jointly finance a new effort in that direction;
2 correct?

3 MR. SCHWARTZBAUER: Objection.

4 A. I'm sorry. Could you -- because I was reading
5 and listening at the same point in time, I apologize;
6 can you ask it again, please?

7 (The record was read by the reporter.)

8 A. Well, that's more with number 2, I guess. 1 and
9 2 together are saying that we're going to do
10 something jointly and this is what it is.

11 Q. And what they're going to do jointly is to
12 establish the Tobacco Industry Research Committee?

13 A. Yes.

14 Q. And that's going to be an organization that is
15 going to engage in research efforts into all phases
16 of tobacco use and health; true?

17 MR. SCHWARTZBAUER: Objection.

18 A. Well, I don't know what you're -- I mean this
19 document is so clear, unless we talk about the -- you
20 know, the interpretations of it, it says what it
21 says, that we're -- we're going to aid and assistance
22 and joint financial aid, and -- and the vehicle for
23 doing that is the TIRC.

24 Q. And what the TIRC is going to do is to support
25 research into all phases of tobacco use and health,

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1 that's its purpose, its stated purpose; correct?

2 MR. SCHWARTZBAUER: Objection.

3 A. Well its stated purpose is again what's in this
4 paragraph in number 1.

5 Q. Which is the research effort into all phases of
6 tobacco use and health?

7 MR. SCHWARTZBAUER: Objection.

8 Q. Correct?

9 A. It's pledging aid and assistance. I mean what
10 -- the sentence says explicitly aid and assistance
11 to the research efforts into all phases of tobacco
12 use and health.

13 Q. And then number 2 specifically says for this
14 purpose we're going to establish the TIRC, and
15 "purpose" refers back to number 1?

16 A. Yes.

17 Q. And then in number 3 it indicates that in charge
18 of the research activities of this new organization
19 will be a scientist of unimpeachable integrity and
20 national reput?

21 A. Yes.

22 Q. And then it goes on to state this this new
23 organization will have a Scientific Advisory Board of
24 scientists disinterested in the cigarette industry;
25 correct?

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1 A. Yes.

2 Q. The suggestion there being that these scientists
3 on the SAB will be focused on the public interest and
4 not the interests of the cigarette companies?

5 MR. SCHWARTZBAUER: Objection.

6 A. It says what it says. It says that they're
7 disinterested, that they don't have a -- I guess a
8 financial or personal entanglement with the cigarette
9 industry.

10 Q. So that would be a reasonable interpretation?

11 A. Well, no, I said the sentence is what it says.
12 People could interpret that these people would be
13 totally objective and separate from the cigarette
14 industry. Some people might interpret it as that.

15 Q. And then at the end of item number 3 it says
16 that these scientists on the SAB will advise the
17 committee on its research activities; correct?

18 MR. SCHWARTZBAUER: Objection.

19 A. Yes.

20 Q. And the committee, of course, is the TIRC which
21 would be owned by the tobacco companies that are
22 establishing it?

23 MR. SCHWARTZBAUER: Objection.

24 Q. True?

25 A. Well, we're actually getting to the literal

1 language here, and I don't know what -- I'm getting
2 confused now as to what the committee is. I don't
3 think it -- I don't think it -- this statement
4 actually explains what the committee is. It says --
5 oh, I'm sorry, it's and the committee. I thought
6 this was some committee overseeing the TIRC. Okay.
7 Here -- so, yes, it's referring to the TIRC.

8 Q. And the TIRC is owned by the tobacco companies?

9 A. I don't -- I don't know that. I don't know who
10 owns it, whether it is owned by anyone or what,
11 whether it's a not for profit association of folks
12 that meets occasionally or what. I actually don't
13 remember.

14 Q. Well assuming it's not for profit, the only
15 reasonable interpretation of this ad is that if the
16 tobacco companies are establishing this joint
17 industry organization, they're going to own it; true?

18 MR. SCHWARTZBAUER: Objection.

19 A. Well, I -- I can't today remember whether that's
20 true. That certainly wouldn't have to be true. They
21 could set it up and say, Here's an organization, we
22 give you money, go do stuff, and we don't own you.
23 So it wouldn't have to be set up that way, but I
24 don't think it was set up that way, but I don't -- I
25 actually don't remember how it was set up.

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1 Q. Well would your reading of this ad at least
2 about to the effect that the tobacco companies will
3 have some relationship to this TIRC after it is
4 established?

5 A. Well, yeah, because 2 says that it's a joint
6 industry group and that's going to consist initially
7 of these people down below.

8 Q. And it's your understanding from the ad that the
9 joint industry group known as TIRC is going to fund
10 scientific research into all phases of tobacco use
11 and health?

12 MR. SCHWARTZBAUER: Objection.

13 A. It will receive funds from which then it will
14 fund research.

15 Q. And do you believe that a reasonable inference
16 from the ad is that the results of the research will
17 be fairly and objectively communicated to smokers in
18 some manner, shape, or form?

19 A. Doesn't say anything about how the results will
20 be -- any results or any research would be
21 communicated at all.

22 Q. Well it doesn't set up any procedures with
23 respect to that, but is it reasonable to assume that
24 if the cigarette industry is establishing this
25 research group to conduct research into all phases of

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1 tobacco use and health that it will disclose to the
2 public the results of the research?

3 MR. SCHWARTZBAUER: Objection.

4 A. Well, we can only go by what it says, and it
5 says nothing actually about whatever will be
6 communicated from this body.

7 Q. All right. So in your view, Dr. Scheffman, for
8 smokers who read this ad back in 1954, they would be
9 at a loss to understand whether or not anybody would
10 ever know about the results of this research that's
11 going to be funded by the tobacco industry?

12 MR. SCHWARTZBAUER: Objection.

13 A. All I can say is that the language as I read it
14 leaves unclear what's -- what's going to be done with
15 whatever is -- is funded.

16 Q. So if it turned out that the intent of this ad
17 was that the tobacco industry was going to fund some
18 research and it would only allow publication of
19 research that supported the tobacco industries'
20 financial interests, that certainly wouldn't be an
21 example of putting the health of consumers above the
22 interests of the tobacco companies, would it?

23 MR. SCHWARTZBAUER: Objection.

24 MR. EISZNER: Objection.

25 A. I don't know.

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1 Q. Well if the tobacco companies were actually
2 going to put the health of the consumers above their
3 own company interests, one would assume that they
4 would release the results of the research that they
5 funded --

6 MR. SCHWARTZBAUER: Objection.

7 Q. -- for publication?

8 MR. SCHWARTZBAUER: Objection.

9 Q. Is that reasonable?

10 A. No. I don't know whether -- it goes back to
11 what that means. I -- it could be, and this isn't
12 what it ways, that we're going to set this up because
13 we really don't know, and these folks are going to
14 tell us what as best they can tell the truth is, and
15 then we're going to act accordingly, and that could
16 be a way of acting in the public interest. That's
17 not what it was. But I mean this is what it is. We
18 know that -- in fact that they did communicate what
19 the research --- the research that was funded was
20 communicated, but I mean we're talking about the ad.
21 The ad doesn't tell us what -- what specifically
22 they're going to do with it.

23 Q. Now the whole setup for this organization
24 dedicated to funding research that's going to be
25 bankrolled by the tobacco industry would involve a

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1 potential conflict of interest between the interest
2 of the tobacco industry in selling cigarettes and the
3 interests of smokers in not dying of lung cancer;
4 true?

5 MR. SCHWARTZBAUER: Objection.

6 A. Not necessarily.

7 Q. Not necessarily, but certainly very possible;
8 correct?

9 If it turned out that the research showed that
10 smoking caused lung cancer, that would be very useful
11 information for smokers to have, wouldn't it?

12 MR. SCHWARTZBAUER: Objection.

13 A. Depending on what it was, depending on what the
14 valid interpretation of the study was.

15 Q. Assuming there were -- there was research
16 conducted from which valid conclusions could be drawn
17 that smoking caused lung cancer, that would be very
18 useful information to cigarette smokers, correct?

19 A. Well valid conclusions, there's a lot in that,
20 but I would -- in my interpretation of valid I would
21 say yes, that would be useful.

22 Q. But that same information that would be useful
23 to the cigarette smokers as providing motivation to
24 stop smoking would be harmful to the economic
25 interests of the tobacco companies; correct?

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- 1 A. It -- it would reduce sales quite possibly.
- 2 Q. And as we discussed before, the profits of any
- 3 company are a matter of paramount importance to that
- 4 company; true?
- 5 A. I think I disagreed with that.
- 6 Q. That profits are not a matter of paramount
- 7 importance to companies?
- 8 A. What do you mean "paramount"? Most important?
- 9 Q. Certainly one of the most important.
- 10 A. One of the most important. But there are few
- 11 major companies that I know who in their mission
- 12 statements or public statements would say that that
- 13 is their most important -- that that's the most
- 14 important thing for them.
- 15 Q. In terms of in the real world what do you think
- 16 most companies put ahead of profits as a matter of
- 17 importance?
- 18 A. I think often what they say and often do is --
- 19 is act ethically, whatever that means.
- 20 Q. So you believe that most companies operating in
- 21 the United States place business ethics in a more
- 22 important position of concern than profits?
- 23 A. Yes, I think typically you'd find that the
- 24 things that would be above profits would be ethics,
- 25 and employees, these days concern for the

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1 environment, many companies would place that ahead.

2 Q. And do you believe that most companies would
3 place those three things ahead of profits?

4 A. I think that a lot of companies have statements
5 that that's true and I think that a lot of them act
6 more or less in accord with that.

7 Q. Well aside from the mission statements which may
8 or may not be a form of public relations, in the real
9 world when companies meet through their boards of
10 directors, what do you think is more important;
11 profits, ethics, the environment, employees?

12 A. It depends on the situation as to whether
13 there's any -- it depends. There's not necessarily a
14 trade-off between those things. Accomplishing all
15 those things are generally fully consistent, but some
16 circumstances can arise where there are trade-offs,
17 and then -- then they may have to make choices.

18 Q. And -- and where do you think most companies put
19 the priority when they're forced to make choices
20 between profits, the welfare of their employees,
21 business ethics, and the environment?

22 A. I think most companies make -- where there is a
23 significant, important trade-off, they make very
24 difficult choices which often are trade-offs somewhat
25 at least against profitability.

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1 Q. So how would you range the priority of those
2 four areas of consideration when trade-offs are
3 required?

4 A. It's -- it's a situation where context is
5 critical. Again, we believe in -- you know, that
6 what we would teach in business school and most
7 companies believe that in the normal course of
8 business those four objectives are fully consistent,
9 that -- there's a lot of research that long-term
10 profitability and viability of the company is best
11 served by being ethical, by taking into account the
12 welfare of your employees and properly taking into
13 account the environment, et cetera.

14 Q. And in terms of the -- of the documents that
15 you've reviewed in connection with this particular
16 lawsuit, do you believe that based upon those
17 documents it appears to you that the cigarette
18 manufacturers have placed business ethics ahead of
19 profits?

20 A. I don't -- -- that's a -- that's too vague a
21 question. I think you'd have to ask -- and I have
22 taught this case to business students about the
23 cigarette industry, and I think you can't ask this
24 case -- this isn't metaphysics, this is real business
25 and real life, and you can ask what specifically do

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1 you think they should have done differently from what
2 they've done, if you think they -- they should have
3 done something differently. You generate a very
4 interesting discussion amongst M.B.A.'s so -- on
5 that.

6 Q. Well with regard to the cigarette industry and
7 based on the documents you have reviewed in this
8 case, in a situation where the release of information
9 that tended to establish a link between smoking and
10 disease might occur, have you seen any instances
11 where the cigarette industry itself or TIRC or its
12 predecessor, CTR, attempted to suppress any such
13 information?

14 MR. SCHWARTZBAUER: Objection.

15 MR. EISZNER: Could I have that question
16 read back, or questions?

17 (The record was read by the reporter.)

18 MR. EISZNER: Objection, foundation.

19 A. I don't know what you mean by "suppress".

20 Q. Don't know what suppress means?

21 A. Well I don't know what you -- if it's in --
22 because if it's information you have yourself, you
23 can't suppress that information; you can choose to
24 disclose it or not. If it's information you don't
25 have, that's -- you could I guess try to suppress the

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1 dissemination of information that you don't have.

2 Q. Well even if you have information, you could
3 attempt to suppress others learning of it; correct?

4 A. Well I would put it that you -- that you would
5 choose not to disclose it if you have it.

6 Q. All right. If you -- have you seen any
7 instances in which tobacco companies or TIRC or CTR
8 has attempted to prevent or reduce the dissemination
9 of information that tended to establish the link
10 between smoking and disease?

11 MR. SCHWARTZBAUER: Objection.

12 A. That's too general a question. I -- I know that
13 there's certainly -- there are allegations involving
14 the CTR where some researchers claim that their --
15 someone was trying to suppress their research, there
16 are two sides, that's what they say, and someone else
17 says something else as to whether that was true.

18 Q. And you're not in a position to determine
19 whether those allegations are true or not?

20 A. The fact finders, if they thought that would be
21 important, they could determine.

22 Q. But certainly to the extent that this TIRC
23 funded some research, the results of which suggested
24 a causal link between smoking and disease, the
25 dissemination of that information would work against

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1 the economic interests of the cigarette companies
2 that owned TIRC; correct?

3 A. That was the conclusion of people within various
4 of the companies that that's exactly what happened.

5 Q. So there is a definite potential for a conflict
6 of interest situation to arise between the duties of
7 the employees of TIRC and C -- later CTR to fairly
8 describe the results of research which that
9 organization funded and the economic interests of the
10 tobacco companies that supplied the funds for the
11 research?

12 MR. SCHWARTZBAUER: Objection.

13 Q. True?

14 A. I think how TRIC -- TIRC conveyed the results
15 was largely irrelevant, remember, because what they
16 -- they funded outside researchers, academics and
17 other independent researchers. Those researchers
18 were to publish and did publish several thousand
19 studies in peer-reviewed journals. That's the --
20 those spoke for themselves and the editors of the
21 journals and the other scientists who read those
22 journals.

23 Q. Well to the extent that the press releases or
24 other public comment of TIRC on those subjects had
25 any relevance at all, it may well have involved a

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1 conflict of interest between the fair and objective
2 disclosure of those results and the economic
3 interests of the tobacco companies; true?

4 MR. EISZNER: Objection.

5 MR. SCHWARTZBAUER: Objection.

6 A. I don't know whether conflict of interest is the
7 right term. They could have -- certainly a lot of
8 research that TIRC funded was viewed by people in
9 various companies as -- as strengthening the evidence
10 of a conclusion of the relationship between disease
11 and smoking, and that would be, you know, against the
12 short-term economic interests of the tobacco
13 companies.

14 Q. Have you ever seen any documents that were
15 issued by the C -- TIRC or the CTR itself that
16 endorsed such a conclusion?

17 A. I don't think I've seen many documents about the
18 CTR that I can think of.

19 Q. Among those that you've seen you haven't seen
20 any that endorsed such a conclusion?

21 A. Endorsed which conclusion now?

22 Q. The conclusion that the results of the study
23 established the link between smoking and disease?

24 A. It couldn't. There is -- there are -- no such
25 study exists. There's no single such study that

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1 exists that I know of.

2 Q. Do you believe that there are any studies that
3 support the causal link between smoking and health?

4 A. My understanding of the scientific community's
5 view is that the overwhelming weight of all these
6 studies leads to a reasonable conclusion that there
7 is a link.

8 Q. And do you know of any document ever issued by
9 TIRC or CTR under that organization's letterhead or
10 auspices that endorsed the conclusion that the
11 overwhelming weight of scientific evidence
12 establishes the link between smoking and disease?

13 A. I don't -- I don't see that -- from what I
14 recall of TIRC as that being -- them having a role in
15 that. They funded research, the research was done,
16 it was published, and if it was successful from a
17 scientific perspective was published by the
18 researcher in peer-reviewed journals and was
19 disseminated that way, and then other people would
20 comment, including the researchers, on what they
21 thought it meant.

22 Q. Well research that tended to establish a causal
23 link between smoking and health would certainly come
24 within the framework of conducting research into all
25 phases of tobacco and health; would it not?

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1 A. Research that had that result, yes.

2 Q. And have you ever seen anything in which the CTR
3 or the TIRC endorsed a conclusion from any research
4 that it sponsored that tended to establish such a
5 link?

6 A. I think I said before, I don't -- I don't -- I
7 never saw very many CTR documents. I'm not sure that
8 that was even a role, making such statements was even
9 a role of the -- that the TIRC had. It was a
10 granting agency.

11 Q. Now are you saying you haven't been shown any
12 documents from the CTR or the TIRC, its predecessor,
13 that indicated that those organizations intended to
14 make public what the research they funded disclosed
15 with respect to the issue of tobacco use and health?

16 A. I do in the sense that it was the intent of the
17 TIRC, and that's what it did, was that the funded
18 research would be published in peer-reviewed journals
19 and then it was.

20 Q. But do you have any understanding of whether or
21 not TIRC, and later CTR, attempted to comment upon,
22 summarize, or otherwise describe what it inferred
23 from the research data that it had funded?

24 A. No.

25 Q. And you're not aware that TIRC or CTR ever

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1 engaged in that type of conduct?

2 A. I'm -- I'm vague on that as to whether --

3 whether they engaged in such conduct or not.

4 Q. Now back at the time that the Frank Statement

5 was issued, does it seem reasonable to you that the

6 cigarette sponsors of this ad might well have wished

7 to communicate a message that there was a real

8 controversy as to whether or not smoking did cause

9 health problems?

10 MR. SCHWARTZBAUER: Objection.

11 A. My guess is they -- they accepted in the ad that

12 there was a real controversy. I suspect they would

13 have preferred to say that there isn't a real

14 controversy, whether they -- they clearly are

15 admitting that it was a real controversy.

16 Q. They're admitting that there is from their

17 perspective a real controversy and they indicate in

18 the ad that they are going to investigate the issue

19 by providing the funds to support this research;

20 true?

21 A. Well that's not the same as they're going to

22 investigate. I mean the reality here is that they

23 mainly say what they're doing and that would be that

24 they're going to support the health and scientific

25 community's efforts because that almost surely would

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1 be where the answer would come from eventually.

2 Q. But they specifically reference that what
3 they're going to do by way of funding the TIRC is
4 going to be in addition to what is already
5 contributed by individual companies; correct?

6 A. Correct.

7 Q. And that appears to be some reference to the
8 research activities of the individual companies; --

9 MR. SCHWARTZBAUER: Objection.

10 Q. -- does it not?

11 MR. SCHWARTZBAUER: Objection.

12 A. Yes.

13 Q. Okay. So the sponsors are indicating that
14 they're going to continue to conduct some research of
15 their own; correct?

16 MR. SCHWARTZBAUER: Objection.

17 A. Well it says what it says. It says what is
18 already being contributed by individual companies.

19 Q. And in addition to that they're going to fund
20 the research that's going to be conducted through the
21 operation of the TIRC?

22 A. Yes.

23 Q. And assumedly the research conducted by the
24 companies, as well as the research sponsored by TIRC,
25 will eventually shed some type of light on whether

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1 this alleged relationship between smoking and health
2 is valid or not?

3 A. I think will contribute to the much greater
4 effort undertaken by the main entities that were
5 going to and did undertake this effort and
6 historically have taken this effort which were
7 publicly- and privately-funded researchers outside
8 the tobacco companies.

9 Q. But aside from what's going on outside of the
10 control of the tobacco companies, the ad suggests
11 that surely the efforts of the tobacco companies here
12 are going to be of some consequence with respect to
13 this overall activity; correct?

14 A. Well there's no claim as to that. They're
15 saying -- all they're saying is that they're going to
16 get money and set up this committee and fund
17 research.

18 Q. And at least it's potentially possible that the
19 research might discover something of import?

20 A. Oh, I think that -- that was the hope, but it's
21 just one part of the overall worldwide effort.

22 Q. All right. So from the standpoint of the
23 sponsors, they're going to spend money on supporting
24 research sponsored through TIRC, and it may turn out
25 that the research is totally worthless with respect

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1 to figuring out if there's any relationship between
2 smoking and health, but on the other hand some of it
3 may be of some pertinence to that issue; true?

4 A. Well, I don't -- I'm uncomfortable with your
5 characterization. I don't know whether there was a
6 characterization. Most research, you know, because
7 of the nature of research turns out in reality -- is
8 supposed to be pretty worthless, that's just the
9 research process, and they were funding research,
10 like lots of entities were funding research, and it
11 was going to come out however the dice turned out.

12 Q. So you would assume that the sponsors of TIRC,
13 the tobacco companies that were funding TIRC might
14 well have thought that most of the research conducted
15 through that organization might turn out to be
16 worthless?

17 A. No, not at all. That's why I got the problem on
18 the characterization. I don't think so. I think --
19 I think that -- I suspect their greatest hope was
20 that the research would show either -- their greatest
21 hope was that the research, maybe some research would
22 show there wasn't a problem at all, which has often
23 been the case in situations like this, or second
24 best, you know, it was a solvable problem, which we
25 know still today isn't true.

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1 Q. So if the research that was funded through TIRC
2 established that there was no relationship between
3 smoking and disease, you would conclude that the
4 cigarette companies would have been delighted to have
5 disseminated those results?

6 MR. SCHWARTZBAUER: Objection.

7 A. I think the cigarette companies and smokers
8 would have been delighted if that had been the
9 result.

10 Q. Both of those entities would have been delighted
11 if that were the result?

12 A. Yes.

13 Q. Okay. So if the cigarette companies learned
14 that results from research that they funded validly
15 and reliedly -- reliably established that smoking
16 played no role in the etiology of cancer or these
17 other diseases, there would have been absolutely no
18 reason why the cigarette industry would not have
19 published those results as widely as possible; true?

20 A. I don't know what. I think what the industry
21 would have hoped, if that would have been the result,
22 is that the medical community would have widely
23 publicized that result. That would be the
24 most-hoped-for event.

25 Q. On the basis that if the medical community

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1 endorsed those results, that would provide additional
2 credibility to the results?

3 A. Additional. That would provide the main
4 credibility.

5 Q. But certainly if the -- if the results allowed
6 the cigarette companies to take any position that
7 here's a study that shows that there is no cause and
8 effect relationship, it would have been obviously in
9 the interest of the cigarette companies to
10 disseminate that information?

11 A. It may have been.

12 Q. Well can you think of any reason why it wouldn't
13 have been?

14 A. It depends on what it was was being interpreted,
15 and it would depend on whether -- whether the company
16 may -- may come to the conclusion that if we -- if
17 we're the ones that make this argument, we're not
18 going to be credible, it would be a lot better if
19 someone else made it. I don't know. It would depend
20 on the situation.

21 Q. But Dr. Scheffman, this is a relatively simple
22 situation where the cigarette companies have got a
23 real interest in selling cigarettes; do they not?

24 A. Yes.

25 Q. And if they've got information that cigarettes

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1 don't cause disease, they'd have every motivation to
2 try to let everybody involved know about that;
3 correct?

4 A. We -- I -- I agree with that. I thought the
5 question was about what the specific vehicle for
6 letting people know.

7 Q. They'd certainly have no reason to conceal such
8 information, would they, or suppress it?

9 A. I -- I don't think so.

10 Q. And certainly the information would be very
11 happy news to smokers?

12 A. Depending on if it's a clear conclusion which is
13 accepted by the medical community that there's no
14 health problem here, folks.

15 Q. If it's got 100 percent reliability, that's
16 better than if it's got 50 percent reliability, but
17 if it's got any degree of reliability, it's good news
18 to smokers; true?

19 A. Well --

20 MR. SCHWARTZBAUER: Objection.

21 A. Now you're using no -- if you mean reliability
22 as to the study, that means something different from
23 -- the study being reliable is of very little
24 consequence to the common person. They want to know
25 what does it mean for me? It might be totally

1 reliable and meaningless for me.

2 Q. But if the study provided some evidence that
3 realistically supported the notion that cigarettes
4 don't cause disease, that would be good information
5 to smokers regardless of whether it were absolutely
6 agreed to by everybody on the planet or just some of
7 the people on the planet; correct?

8 MR. SCHWARTZBAUER: Objection.

9 A. I don't think that's true, and I actually -- now
10 that I understand your question, we know that that's
11 not true; that is, there were -- certainly in 54 and
12 much later than that there were studies in the public
13 domain, as pointed out in this ad, that questioned
14 the connection.

15 Q. And Dr. Scheffman, you're still misunderstanding
16 this whole line of questioning.

17 A. That could be.

18 Q. I'm not talking about studies that questioned,
19 but rather studies that supposedly determined smoking
20 does not cause lung cancer any more than chewing on
21 toothpicks does.

22 A. There weren't -- I don't think there ever has
23 been such a study.

24 Q. Okay. But if there were such a study, for all
25 the cigarette companies knew back in January of 1954

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1 to -- 54, the funding that they provided might have
2 led to such a study; correct?

3 MR. SCHWARTZBAUER: Objection.

4 A. Conceivably.

5 Q. All right. And if that happened, the cigarette
6 companies would have every reason to disseminate the
7 results of such a study?

8 A. I agree.

9 Q. And smokers who received the news would have
10 every reason to be relieved?

11 A. I think that's correct.

12 Q. And if the opposite occurred, if the research
13 conducted through the TIRC established directly the
14 opposite result, smoking does cause lung cancer and
15 other diseases, --

16 A. In the same way of the McLaughlan-esque
17 metaphysical certainty, 100 percent?

18 Q. Yes.

19 A. Right.

20 Q. To the same degree as we were previously talking
21 about.

22 A. Right.

23 Q. -- again that would be bad news to smokers in
24 the sense that they would be concerned that they had
25 been smoking, but it would be good news with regard

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1 to the choices that they were going to make in the
2 future?

3 MR. SCHWARTZBAUER: Objection.

4 A. I think it would be bad news period.

5 Q. Bad news if they wanted to continue to smoke?

6 A. I think it'd be bad news because, you know, if
7 you've been a smoker for any length of time, it would
8 be bad news period.

9 Q. But if it meant saving your life, giving up the
10 cigarettes, wouldn't at least some people regard that
11 as good news, trading your life for your cigarette
12 smoking habit?

13 A. In that sense I guess.

14 Q. But it would certainly be bad news to the
15 cigarette industry --

16 A. Yes.

17 Q. -- in every way possible?

18 A. Yes.

19 Q. Okay. So if the sponsors of the Frank Statement
20 intended to convey to smokers that cigarette
21 companies would sponsor research and disclose the
22 results of the research, the companies would face a
23 potential problem, economic problem if it turned out
24 that the results of the research implicated smoking
25 with disease; true?

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1 MR. SCHWARTZBAUER: Objection.

2 A. If the research they funded tended to support
3 the conclusion that there was a serious health
4 problem, that would be a problem for the company and
5 that's in fact what the companies thought was
6 happening.

7 Q. And it might well be that the group that got
8 together to form TIRC determined ahead of time how
9 each member of the group would treat any information
10 that might further the causal link between smoking
11 and health. That would have been reasonable; would
12 it not?

13 MR. SCHWARTZBAUER: Could I have that
14 question read back?

15 (The record was read by the reporter.)

16 MR. SCHWARTZBAUER: Objection.

17 A. I don't know what "reasonable" means. I don't
18 --

19 Q. Well, for instance, the -- the group that got
20 together and sponsored this ad, they had to reach
21 consensus about running this ad; correct?

22 A. Yes.

23 Q. As a -- as a group they were collectively making
24 certain representations in this ad.

25 MR. SCHWARTZBAUER: Objection.

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1 Q. Correct?

2 MR. SCHWARTZBAUER: Objection.

3 A. Well I -- I don't want to agree to
4 representations, but they had to agree to what the ad
5 said.

6 Q. They were making certain statements of their
7 intent; correct?

8 MR. SCHWARTZBAUER: Objection.

9 A. This ad is what it is.

10 Q. Okay. But a reasonable interpretation of what
11 the ad consists of is a series of statements of
12 intent; correct?

13 MR. SCHWARTZBAUER: Objection.

14 A. No, it's mostly not about intent at all. The
15 last -- the last third of the ad deals I guess with
16 intent.

17 Q. Well there's an intent to establish this TIRC;
18 correct?

19 A. Yes.

20 Q. There's an intent to place smokers' health above
21 every other consideration of the companies' business;
22 correct?

23 A. I don't know about "intent". Intent's a loaded
24 word. Let's stay with the sentence as it is,
25 "accept".

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1 Q. When it says -- when it says "we accept" that
2 means that they intend to do that; does it not?

3 A. Yes, that means we. I can't imagine why you
4 want me to be an expert on this, if this is all to
5 deal with the product liability thing, I doubt that I
6 am the expert on interpreting whether -- whether this
7 ad raises product liability issues. As I've said,
8 the ad is what it is, it says what it says.

9 Q. I didn't mention product liability, did I?

10 A. But I don't know why you want -- it's just I
11 don't know why you're asking me these -- why am I --
12 why am I -- I've done no analysis about what --

13 Q. All right.

14 A. -- this ad implies.

15 Q. Assume hypothetically that this ad includes
16 certain statements of intent on the part of the
17 sponsors. All right?

18 A. (Witness nods head.)

19 Q. You have to answer audibly.

20 A. Yes. Yes, sorry.

21 Q. And that the sponsors collectively agreed that
22 they would offer these statements of intent. All
23 right?

24 A. Okay.

25 Q. An issue would arise as to whether or not they

1 actually intended to honor their statements of
2 intent; correct?

3 MR. SCHWARTZBAUER: Objection.

4 A. Well I can -- you can -- it could be an issue.
5 Someone could raise that issue.

6 Q. Someone could -- could have raised the issue of
7 what do we do though if we state our intention to
8 disclose the results of -- of the research if it
9 turns out that the results are very bad for our
10 companies economically. That certainly would be
11 plausible, would it not?

12 A. I'm sorry to -- see, I don't understand the
13 question, because it seems not to relate to what --
14 I'm guess I'm too grounded in what I know about what
15 actually happened, which is they funded research and
16 the researchers funded their results, so.

17 Q. I'm talking about the cigarette companies
18 getting together and deciding to run this ad and
19 establish this TIRC. Are you with me on that?

20 A. Yes.

21 Q. The question might -- what -- if as part of
22 those activities it was intended that the companies
23 would collectively make certain statements of intent
24 regarding disclosure of the results of the research,
25 --

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1 A. But I mean we got an ad in which there is
2 nothing in this ad dealing with that, that's what --
3 this ad says nothing, let alone intent, nothing at
4 all about disclosure.

5 Q. As you read the ad it says nothing about whether
6 or not the companies are going to disclose the
7 results of any of this research it's going to fund?

8 A. What -- what disclosure, if anything, will
9 occur.

10 Q. I want you to assume that there are other
11 documents issued by the TIRC in which it makes a
12 statement of intent to disclose the results of the
13 research. All right?

14 A. Okay.

15 Q. If that -- if that was a statement issued by the
16 management of TIRC, it was assumedly endorsed by the
17 owners of the company; correct?

18 MR. SCHWARTZBAUER: Objection.

19 A. I don't know that -- I keep saying I don't know
20 whether this was a, quote, "company" and whether it
21 had to be endorsed by the so-called owners or not.

22 Q. Well I want you to assume that the evidence is
23 going to show take TIRC had an executive committee
24 that was composed of executives of tobacco
25 companies.

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1 A. Yes.

2 Q. And that the company was operated based upon the
3 operation of that executive committee.

4 A. Yes.

5 Q. In that event, a company press release
6 containing a -- an intention to disclose the results
7 of its research in a fair and objective way would
8 assumedly be with the approval of that executive
9 committee?

10 MR. SCHWARTZBAUER: Objection.

11 Q. That seems reasonable; does it not?

12 MR. SCHWARTZBAUER: Objection.

13 A. Yeah, but it wouldn't -- I -- I mean I'd have to
14 know that --

15 Q. And if the -- if the tobacco companies didn't
16 know ahead of time what the results of the research
17 were going to be, and that would seem likely;
18 correct, --

19 A. Yes.

20 Q. -- favorable results of the research would raise
21 no concerns about disclosing the information;
22 correct, keeping the pledge to disclose?

23 A. What pledge to disclose?

24 Q. If there were a pledge to disclose, Dr.
25 Scheffman.

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1 A. I got you, I'm sorry, right.

2 Q. If there were a pledge to disclose, Dr.

3 Scheffman, and if the results were favorable to the

4 economic interests of the cigarette industry there

5 would be no problem with honoring the pledge to

6 disclose; correct?

7 A. Correct.

8 Q. There would be a potential problem with honoring

9 the pledge to disclose if the research results were

10 adverse to the economic interests of the cigarette

11 industry; correct?

12 MR. SCHWARTZBAUER: Objection.

13 A. The potential adverse consequences of release in

14 that case, yes.

15 Q. And it's certainly plausible that those that got

16 together to reach a consensus on forming TIRC and

17 taking this ad out may well have addressed the

18 situation of what do we do if we're going to honor --

19 if we are going to pledge to disclose the research

20 results if it's turns out that the research results

21 are very adverse to our economic interests?

22 MR. SCHWARTZBAUER: Objection.

23 Q. That's certainly plausible; is it not?

24 A. Yes.

25 MR. SCHWARTZBAUER: Objection.

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1 Q. And in that situation, if everybody agreed that
2 they would attempt to suppress the results of any
3 research that established the link between smoking
4 and disease, that would have also been in the
5 collective interests of those involved; correct?

6 A. Could have been.

7 MR. SCHWARTZBAUER: Objection.

8 Q. And in fact if one of the sponsors of this Frank
9 Statement and of the TIRC chose to honor a pledge to
10 reveal the results that turned out to be bad for the
11 economic interests of the company, that would place
12 all the other companies in even a worse light; would
13 it not?

14 MR. SCHWARTZBAUER: Objection.

15 A. Remember the -- the TIRC did not have the
16 information. Okay. They could use the information,
17 but the researchers had the information.

18 Q. But the TIRC had access to the information;
19 correct?

20 A. Well, yes, along with the researchers.

21 Q. And the executive committee of the TIRC would
22 assumedly have had access to the research?

23 A. I guess, yeah.

24 Q. And the company certainly had access to the
25 individual research that each company conducted?

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1 A. Yes.

2 Q. And if one of the companies that had made a
3 pledge to disclose the results of the research,
4 whatever it might be, honored the pledge and
5 disclosed results that adversely affected the
6 economic interests of that company, the other
7 companies would be placed in even a worse light;
8 correct?

9 MR. SCHWARTZBAUER: Objection.

10 A. Why?

11 Q. Because the company that had disclosed the
12 information would at least get points for integrity.

13 A. I don't know how much. That might be worth
14 something.

15 Q. Okay. And if others had made a similar pledge,
16 but made no such disclosure, and also had the same
17 information, those companies would be placed in a
18 potential competitive disadvantage relative to the
19 company that had forthrightly reported the results;
20 true?

21 MR. SCHWARTZBAUER: Objection.

22 MR. EISZNER: Objection.

23 A. No.

24 Q. If one of the companies reported research
25 results that tended to support the link and basically

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1 said, Hey, we told you we were going to let you know
2 the results, here it is, we don't think it's
3 conclusive, but we have to admit this tends to
4 support the link and feel you're entitled to know
5 about it, we're going to continue to work on the
6 problem, that company may well have gained some
7 market share vis-a-vis the other companies if the
8 other companies had the same information but didn't
9 disclose it; true?

10 MR. SCHWARTZBAUER: Object -- objection.

11 A. It is possible. The opposite is possible.

12 Q. Okay. But given that possibility, that would
13 create some motivation for companies that had no
14 intention of honoring the pledge to disclose the
15 research if it turned out to be bad to collectively
16 agree that none of them would do so if the research
17 turned out to be bad; true?

18 MR. SCHWARTZBAUER: Objection.

19 A. I -- well, I think there's no basis for assuming
20 that -- that the company -- that the company
21 disclosing the information here would get a lot of
22 points and get a lot of market share. I think it's
23 probably more likely that they at least in the short
24 run would suffer adversely relative to competition
25 because people tie their -- you know, tie the message

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1 -- messenger to the message really, and it might be
2 they'd say, Look, these guys are -- these guys are --
3 are very meritorious, but the public has a lot of
4 things to pay attention to, and the main message they
5 get is that Philip Morris told us this bad news. And
6 so often in situations like this the messenger is the
7 one that -- that suffers, so the problem is it's not
8 -- there's no arguing that there was an incentive to
9 suppress because there was this tremendous unilateral
10 incentive to run out and tell people because we'll
11 get brownie points because things are bad. That's
12 just -- I can't accepted that.

13 Q. Well, first of all, if you make a pledge that
14 you're going to disclose the results of research as
15 to whether smoking causes disease, regardless of what
16 they may be, you're very likely to gain some points
17 with the consuming public for having made the pledge
18 in the first place; correct?

19 A. I just disagreed.

20 Q. You don't think that it was of any benefit to
21 any of the sponsors of this ad to make a pledge to
22 the public or a commitment to the public that they
23 would place the health of their smokers above their
24 own economic interests?

25 MR. SCHWARTZBAUER: Objection.

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1 A. I think they might get some brownie points for
2 that, but --

3 Q. And --

4 A. -- I wouldn't -- I wouldn't invest a lot on the
5 uptake in the stock.

6 Q. Because there might well be a good deal of
7 skepticism as to whether or not the company would
8 actually do so if push came to shove?

9 A. And whether it made a difference anyway.

10 Q. But if the company actually followed through on
11 such a commitment and publicly released information
12 that -- that appeared to damage its product, at least
13 in the short-term, that company would at least be
14 perceived as having greater integrity than
15 competitors who attempted to conceal the same
16 information; correct?

17 MR. SCHWARTZBAUER: Objection.

18 A. This is all getting into how consumers would
19 process this information and what they would believe,
20 and I think its -- it's unlikely to be a significant
21 factor. It's not a -- I don't agree that the
22 companies would have strong unilateral incentives to
23 run out and disclose this information to get brownie
24 points. I think -- I think that's a non-starter. I
25 think their unilateral incentive would be to say,

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1 Well, do we really have to disclose it? But I don't
2 understand the questioning anyway, because the
3 information was all disclosed, it was all published.

4 Q. But are you saying you believe the unilateral
5 commitment of a company that has made a commitment to
6 disclose the research results, whether they're good
7 or bad, would likely suppress the results if indeed
8 they were bad?

9 A. It's certainly not going to be generally true
10 that the unilateral incentives are that you run out
11 and disclose it. Sometimes.

12 Q. If you did the research work totally on your own
13 in a unilateral fashion -- Let me strike that and --
14 and make the hypothetical slightly different.

15 If each of the six tobacco companies that had
16 sponsored the Frank Statement had -- rather than
17 collectively issued the statement had issued a
18 similar statement on a unilateral basis in which each
19 company individually pledged that it was going to put
20 the health of its customers above its economic
21 interest, and that each company was going to
22 individually sponsor some research on smoking and
23 health and report the results, if the results were
24 bad, assumedly only that company would know about it;
25 correct?

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1 MR. SCHWARTZBAUER: Objection.

2 MR. EISZNER: Objection.

3 Q. If Company A goes out and says here's some
4 money, we're going to conduct private research on an
5 issue, and the results are bad in terms of what they
6 hope to find, if they have pursued adequate security
7 throughout the research study, they're the only
8 entity that knows; correct?

9 MR. EISZNER: Objection, and counselor,
10 you've asked two questions in a row without letting
11 the witness answer the first one.

12 Q. I'm sorry. Go ahead, Dr. Scheffman.

13 MR. SCHWARTZBAUER: Can we have this
14 question read back.

15 MR. EISZNER: Can I have the last two
16 questions read back.

17 (The record was read by the reporter.)

18 Q. New question, Dr. Scheffman.

19 If a company conducts private research after
20 promising to disclose the results of the research to
21 that public and the results -- results are bad as far
22 as its economic interests are concerned, the company
23 could suppress those results without anybody knowing
24 about it at least potentially; true?

25 A. Yes.

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1 Q. But if a group of companies collectively fund
2 research and collectively promises to disclose the
3 results, all of the members of the group would have
4 the results if they turned out to be bad; true?

5 A. True.

6 Q. And if some of the companies elected to suppress
7 the results, there would always be the concern that
8 one of the others might actually honor the pledge and
9 release the results; true?

10 A. I guess.

11 Q. And if that were to happen, questions might well
12 arise as to the integrity of the companies that had
13 not released the results, assuming they all got the
14 results at about the same time?

15 A. Could.

16 Q. And in that situation the companies that
17 suppressed the results and failed to honor the
18 commitment would be perceived less favorably by the
19 market than the company that had honored the
20 commitment and had released the bad results?

21 MR. SCHWARTZBAUER: Objection.

22 A. Well you asked me that before and I said
23 unfortunately not necessarily true.

24 Q. Not necessarily true but possibly true?

25 A. Uh-huh.

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1 COURT REPORTER: Your answer?

2 Q. Is that a yes?

3 A. Yes.

4 Q. Now if the sponsors of the -- the Frank
5 Statement had agreed that none of them would release
6 the results of research studies if they turned out to
7 be bad, the effect of such a collusive agreement
8 might well be to prop up consumption of cigarettes;
9 true?

10 MR. SCHWARTZBAUER: Objection.

11 MR. EISZNER: Objection.

12 A. This is a lot trickier than that. Let's think
13 about what the hypothetical is here. We put money
14 into research that otherwise would not exist at all,
15 and then we control the end research, and so if we
16 didn't do anything, some information might not exist
17 that might be beneficial to us and everyone else or
18 if -- I mean if we didn't -- if we didn't do this,
19 some information might not come into existence which
20 in fact is good for us and good for everybody. Or
21 some information might come into existence which is
22 bad for us and everybody, but bad for us we would
23 obviously be concerned with. And so there's -- that
24 first part of this, that we set up this collusive
25 agreement to set off this time bomb in which we never

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1 had to do this at all, we never had a duty to do this
2 at all to begin with, to put money into this.
3 Second, I think you mis -- I think this whole line of
4 questioning misapprehends the way markets work.
5 Businesses aren't in the business of giving
6 information away; businesses are in the business of
7 selling products and services, and the way that
8 so-called destructive competition that Professor
9 Jaffe talks about works in reality is that companies
10 use information in the way they advertise products
11 and in the sort of products they introduce that tends
12 to get information out or to reinforce consumers'
13 beliefs. So it's more in what they do in connection
14 with the products that they -- and how they change
15 the products. That's why the tar and nicotine and
16 filter derbies are examples of this destructive
17 competition in which the companies aren't competing
18 to tell people that there's a smoking and health
19 problem and that's not what we see in hardly any
20 market. What we do see is consumers see these guys
21 are selling us and promoting cigarettes with lower
22 tar and less nicotine, they must think there's a
23 problem. I mean that's -- that's the way markets
24 work because that's what companies do is sell and
25 products and services and promote them; they're not

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1 -- they're not in the business of giving information
2 away.

3 MR. GILL: I move to strike the last answer
4 as nonresponsive.

5 Q. The question, Dr. Scheffman, was if the sponsors
6 of the Frank Statement colluded to -- to agree to
7 suppress the results of any research studies that
8 worked against the economic interests of the tobacco
9 companies at selling cigarettes, the -- and they
10 acted on that collusive agreement, the effect of the
11 collusive agreement would have been to prop up the
12 consumption of cigarettes over what it would have
13 been if the bad research results had been released;
14 true?

15 MR. EISZNER: Objection.

16 A. It could. Depending on the information and lots
17 of other things, it could have that effect.

18 Q. And if the consumption of cigarettes was greater
19 as a result of such a collusive agreement over the
20 course of 40 some years than it otherwise would have
21 been, if the conspirators had honored a commitment to
22 release the results of research studies, then more
23 people would have contracted diseases assuming that
24 smoking does cause disease?

25 MR. SCHWARTZBAUER: Objection.

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1 Q. True?

2 MR. SCHWARTZBAUER: Objection.

3 A. A lot of hypothetical assumptions, but yes, I
4 mean it's almost -- almost all logical what you're
5 assuming I guess.

6 Q. If smoking does cause disease, the more
7 cigarettes that are smoked, the more diseases that
8 will occur?

9 A. I'm not an expert on that, so --

10 Q. Well --

11 A. If people took up smoking that otherwise
12 wouldn't have smoked, I guess we -- the medical
13 community could -- and smoked for some amount of time
14 they might get diseases that they otherwise wouldn't
15 have gotten.

16 Q. Or if -- or if other people continued to smoke
17 more cigarettes than they otherwise would have smoked
18 if the manufacturers of the cigarettes had
19 communicated results of research studies that
20 implicated smoking with disease, --

21 MR. SCHWARTZBAUER: Objection.

22 Q. -- that it follows that more disease would
23 occur?

24 A. Well I'm --

25 Q. True?

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1 A. -- I don't have expertise on that. You'd have
2 to rely on medical experts for that.

3 Q. You don't have expertise on whether the smoking
4 actually causes the disease?

5 A. Or whether incremental smoking -- for what
6 people incremental smoking would cause -- might cause
7 disease or whatever.

8 Q. Recognizing that you are not an expert in that
9 area, but assuming that there is a cause and effect
10 relationship between the number of cigarettes smoked
11 and disease, any collusive agreement that caused the
12 increased consumption of cigarettes would also
13 produce an increased amount of disease; true?

14 MR. SCHWARTZBAUER: Objection.

15 A. I think your -- your statement follows directly
16 from the assumptions.

17 Q. And an increased amount of smoking-related
18 disease would have an impact on the cost and extent
19 of health services provided in an attempt to cure
20 that disease?

21 MR. SCHWARTZBAUER: Objection?

22 A. I'm not an expert on that, so.

23 Q. That would also follow; would it not?

24 A. Well that -- that doesn't follow directly from
25 your summary. That sounds right to a layman but --

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1 Q. In other words, people who have -- who are
2 diagnosed with cancer or heart conditions often
3 require health services, usually require health
4 services; correct?

5 A. I'm -- that sounds right, as a layman.

6 Q. And to the extent that more people are diagnosed
7 with cancer and coronary disease as a result of
8 smoking cigarettes, there will be an increase in the
9 extent of health care services provided and required;
10 true?

11 MR. SCHWARTZBAUER: Objection.

12 MR. EISZNER: Objection.

13 A. I'm not an expert on this, but I know one of the
14 -- one of the morbid issues on this is it's not so
15 easy, it's not so -- it's a little trickier than this
16 because people if they die earlier, given medical
17 expenses increase with age, there's a different --
18 there's something going -- in terms of we're talking
19 about not people's welfare but medical expenses,
20 their -- their cost factor is going the other way.

21 Q. But you don't purport to be an expert on that
22 subject, do you?

23 A. No.

24 Q. But assuming that there is a cause and effect
25 relationship between the consumption of cigarettes

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1 and cancer and coronary disease, any increase in
2 cancer and coronary disease due to consumption of
3 cigarettes is going to increase the need for health
4 care services?

5 MR. SCHWARTZBAUER: Objection.

6 MR. EISZNER: Objection.

7 A. I can't give you a different answer than what I
8 have.

9 Q. That seems to follow?

10 A. No, that wasn't my answer. I said I'm not an
11 expert, and I know that there's -- I know that there
12 are issues that work against that conclusion. I
13 don't know what the net is.

14 Q. Have you seen any documents authored by
15 employees of cigarette companies that acknowledge the
16 relationship between cigarettes and health?

17 A. There's certainly documents that talk about
18 that.

19 Q. And if a collusive agreement with respect to
20 suppressing research results if they were bad was
21 carried out, it might well have some impact on the
22 output of cigarettes; true?

23 MR. SCHWARTZBAUER: Objection.

24 A. Okay. I -- I'm -- let me -- let me give you an
25 answer that's nonresponsive but -- because I really

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1 don't -- don't know what it is you've been asking
2 here, but let -- let me answer as an economist,
3 something I'm an expert on, which is information is
4 difficult to suppress and is difficult to keep secret
5 for any length of time, so the issue would be in
6 where you're going. Even under your assumptions, how
7 long would that have been material, would that
8 alleged suppression have been material, if it was?
9 Even under your hypothetical that this was a big deal
10 and if people would have known it they would have
11 acted upon it and it would have reduced smoke, how
12 long would that effect have lasted? Most
13 circumstances in this case probably not very long.
14 Q. But if users of cigarettes are significant -- in
15 significant proportions are addicted to the product,
16 they would be looking for reasons to rationalize
17 their continued use of the product; true?

18 MR. SCHWARTZBAUER: Objection.

19 A. I don't -- I can't -- some may be doing that.

20 Q. And certainly any message that appeared to have
21 any credibility that the addictive product may in
22 fact not cause disease would be a source of
23 rationalization for such a person?

24 MR. SCHWARTZBAUER: Objection.

25 A. I don't -- I mean you're -- I haven't done an

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1 analysis of consumer behavior on that, so I don't --
2 Q. But that would seem to be reasonable; would it
3 not?

4 A. Well what's reasonable -- what I think is
5 reasonable, given that I'm not prepared as an expert
6 on that, I don't know what --

7 Q. But the ability of an addicted user of
8 cigarettes to continue to rationalize smoking on the
9 basis that it may not in fact cause any health
10 problems would be very difficult to sustain if
11 tobacco companies announced that research they
12 supported established a causal link between smoking
13 and disease; true?

14 MR. SCHWARTZBAUER: Objection.

15 A. I don't know that's true at all. I think that
16 people -- my own view is tobacco companies would rank
17 very far down in the hierarchy of what -- of
18 represent -- of who would make representations.

19 Q. Of who would make representations with
20 respect --

21 A. Of the possible --

22 Q. -- with respect to the issue of smoking and
23 health?

24 A. Yes, right.

25 Q. And you don't believe that the tobacco companies

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1 have made very many representations on that subject?

2 A. No, I -- I may have been unclear. In the
3 credibility of who makes the representations, you
4 know, what reliance you would put on who makes the
5 representation.

6 Q. Certainly nonsmokers or light smokers might be
7 inclined to place very little credibility on what
8 tobacco companies say about smoking and health; true?

9 A. I don't know.

10 Q. Anyone though who is looking for reasons to
11 continue smoking because of some addiction are far
12 more likely to take to heart what the manufacturer
13 says about the product than people who don't use the
14 product in the first place; true?

15 MR. SCHWARTZBAUER: Objection.

16 A. I -- I don't think that's true.

17 Q. Well, going back to a previous question, if in
18 fact the output of cigarettes was affected as a
19 result of a collusive agreement between cigarette
20 companies not to disclose the results of research
21 studies, that would be an antitrust injury; would it
22 not, Dr. Scheffman?

23 MR. SCHWARTZBAUER: Objection.

24 MR. EISZNER: Objection.

25 A. What would be the -- what would be the injury?

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1 Q. Collusive conduct that caused -- any collusive
2 conduct that causes a change in either the price or
3 production of a quantity -- of an article or a
4 commodity would be an antitrust injury; would it not?

5 MR. SCHWARTZBAUER: Objection.

6 A. No, I think that's -- I don't know of a case in
7 which suppression of information sustained as an
8 antitrust violation.

9 Q. That's a different matter.

10 A. Collusive -- collusive --

11 Q. Antitrust injuries relate to conduct that
12 modified either price or output; correct?

13 A. No. No, all sorts of market behavior modifies
14 price and output. Antitrust deals with some specific
15 sorts of conduct.

16 Q. Collusive agreements?

17 A. Of some sorts.

18 Q. Collusive agreements of some sorts cause changes
19 or modifications in price or output of the involved
20 commodities; true?

21 MR. SCHWARTZBAUER: Objection.

22 A. That's not the test. I said it depends on what
23 the agreement is about, and I said I'm not aware of a
24 case where collusive suppression of information was
25 sustained as an antitrust violation.

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1 Q. But you are aware of cases in which collusive
2 agreements have been sustained as antitrust
3 violations?

4 A. To restrict output.

5 Q. To restrict output?

6 A. To restrict output.

7 (Reporter interruption.)

8 (Recess from 4:21 it is 4:22 p.m. for paper
9 change.)

10 Q. Let me show you, Dr. Scheffman, what's been
11 previously marked as Plaintiffs' Exhibit 263. Is
12 this one of the documents that you reviewed in
13 preparation for your deposition?

14 (Witness reviewing document.)

15 A. I think so.

16 Q. This is a STATEMENT CONCERNING THE ORIGIN AND
17 PURPOSES OF THE TOBACCO INDUSTRY RESEARCH COMMITTEE
18 AND ITS PROPOSED FUNCTIONS?

19 A. That's the title.

20 Q. Assumedly prepared by that organization?

21 A. Well I don't -- I don't -- if you want to ask me
22 anything about this document I'd have to read it
23 because I -- I'm not that -- I don't have that clear
24 a recollection of the document.

25 Q. All right. Just so we can move along, I'll ask

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1 you to assume hypothetically that this statement
2 concerning origin and purpose and proposed functions
3 was either prepared by TIRC or issued with it's
4 approval. All right.

5 A. Okay.

6 Q. If you'd look at page 8 of the Exhibit under
7 section Roman numeral IV titled Limits -- Limit of
8 Powers. Would you read that paragraph to yourself,
9 please.

10 A. Yes.

11 (Witness reviewing document.)

12 A. Yes.

13 Q. Okay. According to this paragraph one of the
14 purposes and objectives of TIRC is to aid and assist
15 research into tobacco use and health; correct?

16 A. Yes.

17 Q. And particularly into the alleged relationship
18 between the use of tobacco and lung cancer; correct?

19 A. Yes.

20 Q. And also to make available to the public factual
21 information on this subject?

22 A. Yes.

23 Q. Now does the last of those three statements of
24 -- of purpose and function suggest to you that the
25 TIRC is going to publish the results of the research

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1 that it will fund?

2 A. The TIRC did not publish the results of the
3 research. The researchers published the research in
4 peer-reviewed journals. And again this says what it
5 says, it says make available public factual
6 information. It doesn't say anything specifically
7 about what it's going to do with the research it
8 funds.

9 Q. Given the construction of the sentence as a
10 whole, is it reasonable to assume that the statement
11 of intent to make available to the public factual
12 information on this subject refers to the subject of
13 research into tobacco use and health?

14 A. Well I -- I mean you can read English as well as
15 I. It's more proximate to this, and it says
16 particularly into the alleged relationship between
17 use of tobacco and lung cancer, so I don't know --

18 Q. That subject as well?

19 A. I would guess.

20 Q. Then it goes on to state that the activities of
21 the committee shall be confined to the purposes set
22 forth above; correct?

23 A. Yes.

24 Q. And that the committee will not operate as a
25 trade association; correct?

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1 A. Yes.

2 Q. Or participate in any activity or give
3 consideration to any matters affecting the business
4 conduct or activities of its members; correct?

5 A. Yes.

6 Q. Now that last statement, do you infer from that
7 that the committee will not be engaging in any
8 activities that would be of commercial value to
9 members of the committee?

10 MR. SCHWARTZBAUER: Objection.

11 A. Well I -- I covered this in my report. I
12 believe this is we cover our vetting by the DOJ part
13 of this statement, which is the TIRC was to my
14 understanding from the documents vetted by the DOJ,
15 and as part of that certainly that the -- that the
16 TIRC was not supposed to engage in commercial
17 activities or activities related to commercial
18 activities.

19 Q. Activities that could have commercial value to
20 the -- to the members?

21 A. Yes.

22 Q. Because the members are competitors?

23 A. Yes.

24 Q. And it's your understanding that this limitation
25 on purpose and function was inserted to satisfy the

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1 Department of Justice that no collusive activities
2 would occur with respect to commercial matters?

3 A. Well I wouldn't put it that way. One, I don't
4 -- I think this is quite consistent with what I
5 understand the founders wanted the TIRC to do, which
6 is to not be -- to specifically not be engaged in
7 commercial activities. That's something that was of
8 interest to the DOJ but it wouldn't be -- it would be
9 that there wouldn't be any antitrust issues arising
10 from the -- this organization setup with competitors
11 participating.

12 Q. Now do I understand correctly from your report
13 that you viewed the research sponsored by TIRC and
14 its successor, CTR, as being mainly basic research
15 into the cause of disease?

16 A. Well, I -- I characterized that as -- it's
17 certainly more basic. It's not commercial, as this
18 says, and the whole intention of the thing was for it
19 not to engage in commercial research, commercially
20 applicable --

21 Q. How did you differentiate -- I'm sorry. How do
22 you differentiate between commercial research and
23 noncommercial research?

24 A. Well it's a term of art in business and law, and
25 whether it would have -- research that would have

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1 direct commercial implications, they don't -- they
2 wouldn't do research on construction of filters, on
3 tobacco substitutes, on -- It would be issues like
4 what could be learned about the constituents of the
5 biological implications of the constituents of smoke
6 and what would be learned from inhalation studies of
7 smoke and things like that, things that would shed
8 light on the relationship between smoking and health
9 but would not have direct commercial significance.

10 Q. And would the concern about that collective
11 commercial research would tend to stifle the amount
12 of research that each of the members of the TIRC
13 would be expected to conduct individually?

14 A. Whose concern?

15 Q. The Department of Justice's?

16 A. It could have been. Yeah, there could be a
17 concern that the -- collectively carrying out
18 commercial research could under certain circumstances
19 violate the antitrust laws.

20 Q. Are you aware that other experts who have been
21 retained by the Defendants in this case and who have
22 been deposed have stated opinions that they believe
23 that the research conducted by TIRC and CTR did have
24 commercial value?

25 A. Yes.

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1 Q. And you simply disagree with those assessments?

2 A. Well because you say -- I didn't say -- I did

3 not say it had commercial value. Information can

4 have commercial value in that you can take that

5 information and turn it into a product that might

6 have -- that might have commercial value. That --

7 nothing the CTR produced was -- was commercially

8 related research in that it was not directly

9 something you would stick into a product and sell.

10 It might tell you something about how you should

11 design products.

12 Q. And to that extent it would have commercial

13 value; true?

14 A. All information has -- information has

15 commercial value in general. Even basic research has

16 commercial value.

17 Q. And to the extent that the companies were

18 collectively supporting basic research that would be

19 of commercial value, that would tend to stifle the

20 commitment to undertake such research individually;

21 true?

22 MR. SCHWARTZBAUER: Objection.

23 MR. EISZNER: Objection.

24 A. No.

25 Q. The fact that the results of -- of the research,

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1 let's call it the basic research that would have some
2 commercial value, would be accessible to all of the
3 participants in TIRC would tend to diminish the
4 individual incentive to commit funds for that
5 research; correct?

6 A. For which research?

7 Q. If a company is going to conduct private
8 research, the company knows that whatever it invests
9 in the research, it will realize the full economic
10 benefit of that research, whatever it turns out to
11 be?

12 A. Would that it was true. That's generally not
13 true, but -- you hope to reap, that's the hope.

14 Q. But research is much more important to a
15 company, to a competitor, if its competitors don't
16 have access to that same research; correct?

17 A. Depends on the research. The companies -- a lot
18 of the research conducted by the individual company
19 they publish in public source journals, disclose in
20 scientific meetings. They were commercially valuable
21 -- or socially valuable to society.

22 Q. Based upon some assessment that it was to the
23 company's overall advantage to publish the results, I
24 take it?

25 A. In that -- most companies, major companies

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1 engaging in R&D believe it's beneficial to contribute
2 to the overall general production of knowledge in
3 society and they publish -- they support the
4 publication of research.

5 Q. But do you think there's a significant amount of
6 research that is funded by companies privately that
7 the companies tend to use solely for their economic
8 advantage as opposed to the economic advantage of
9 their competitors?

10 A. Well I think it's economic advantage of society,
11 but certainly the focus would be generally on
12 research that could be maintained proprietary.

13 Q. Usually companies tend to have security measures
14 with respect to safeguarding the results of their
15 research, don't they?

16 A. Depends on the research.

17 Q. And typically companies don't want to share
18 their research results with their competitors?

19 A. Depends on the research.

20 Q. Typically I said.

21 A. No, I said typically companies all the time
22 share the results of their research, but obviously
23 not something that's of significant proprietary
24 importance.

25 Q. So your view is that more often than not

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1 companies that -- that privately conduct research,
2 spend their money on it, then disclose the results of
3 the research to everyone, including their
4 competitors?

5 MR. SCHWARTZBAUER: Objection.

6 A. That's not what I said.

7 Q. Then I did misunderstand.

8 A. I said before in an answer that primarily
9 company's research obviously is devoted to
10 proprietary research that they -- but I know major
11 companies also support publication of their own
12 research efforts and they make a judgment as to
13 whether it's in their interest to try and keep it
14 proprietary or not.

15 Q. But all of the research that was going to be
16 funded through TIRC and CTR was going to be available
17 to all of the owners of the organization?

18 A. Was going to be available to everybody in the
19 world.

20 Q. And that would give the owners of the
21 organization, the companies that were going to supply
22 the money for the research, less incentive to supply
23 a lot of money for this research because their
24 competitors were going to have access to the
25 information; correct?

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1 A. Apparently not, because they actually engaged in
2 this activity and spent money on it.

3 Q. But the money that the companies spent on TIRC
4 and CTR was only a tiny fraction of the money they
5 had available to spend; true?

6 A. Well I don't know what "available to spend" is,
7 but --

8 Q. Have you attempted to look into the
9 profitability of any of the Defendants in this case
10 over the last 40 some years?

11 A. I know something about the profitability.

12 Q. And aside from Liggett & Myers they've all been
13 very, very profitable; have they not?

14 A. They've -- I don't have the numbers in front of
15 me. They've differed significantly in their
16 profitability, different companies have.

17 Q. Philip Morris is one of the most profitable
18 companies in the United States; is it not?

19 A. No, I doubt that's true. If measured on
20 conventional, no, that's not true, based on
21 conventional measures of profitability. There's some
22 extremely profitable companies, like Microsoft, and a
23 lot of companies that are much smaller than that,
24 high-tech proprietary companies that are enormously
25 profitable.

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1 Q. Would Philip Morris make the top hundred do you
2 think?

3 A. In -- in what measure?

4 Q. If you put together Fortune 100 companies, would
5 Philip Morris be there?

6 MR. SCHWARTZBAUER: Objection.

7 A. Well Fortune 100 is based on sales or assets so,
8 yes, they're certainly there. It's not on measure of
9 profitability but --

10 Q. So Philip Morris would be in the top 100 with
11 regard to sales and assets but not necessarily in
12 terms of profit?

13 A. If you're talking about all companies in the
14 economy, would Philip Morris be in the top hundred in
15 profitability by conventional measures, I think
16 almost surely not.

17 Q. Top thousand?

18 A. I -- I doubt even that. They're just -- there
19 are thousands, tens of thousands of companies, and
20 some of them are enormously profitable in a year.

21 Q. Has Philip Morris been able to pay any dividends
22 to shareholders over the years?

23 A. Yeah, I wasn't claiming they're not profitable.
24 They're a quite profitable company.

25 Q. Have you seen the amount of money that Philip

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1 Morris and the other Defendants in this case have
2 annually devoted to advertising, their advertising
3 budgets?

4 A. Yes.

5 Q. How does the amount of money that they
6 contributed to CTR on an annual basis compare to what
7 they've spent on advertising?

8 A. Small.

9 Q. Less than one percent?

10 A. I haven't calculated it, but it's small.

11 Q. In that range?

12 A. I don't know. It's small.

13 Q. These were certainly companies that over the
14 last 40 years had the financial capability to devote
15 huge amounts of money to research; true?

16 A. They had considerable profits that -- that in
17 principle they could have devoted much more to
18 research. They probably would have had different
19 management if they did, but --

20 Q. But in terms of what the management of the
21 companies actually did devote to research, compared
22 to either their sales or their profits, it was a
23 very, very tiny fraction; was it not?

24 A. That's typical of all companies, other than some
25 highly research-intensive companies.

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1 Q. Be typical of a car, an automobile manufacturer?

2 A. That R&D would be small relative to advertising
3 or profits.

4 Q. Have you ever looked into a comparison between
5 what automobile companies might devote to R&D
6 relative to advertising and sales compared to a
7 cigarette company?

8 A. I haven't looked into that specifically.

9 Q. But the members of TIRC and CTR as the result of
10 funding that research did gain access to information
11 that each of them could put to commercial use; true?

12 A. As with anyone in the world.

13 Q. But particularly if they were manufacturing
14 cigarettes?

15 A. As any manufacturer in the world.

16 Q. Could enter that industry, you're saying?

17 A. No, any -- any existing manufacturer in the
18 world could use that information if it was
19 commercially useful. If it was useful to turn into
20 something that was commercially useful.

21 Q. And do you know whether the individual members
22 of TIRC and CTR devoted as much of their revenue to
23 internal research as they devoted to funding TIRC and
24 CTR?

25 A. Internal -- internal total R&D budget?

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1 Q. Yes.

2 A. Would be considerably larger.

3 Q. So they spent considerably more on their
4 internal R&D budgets than what they spent funding the
5 TIRC research that was discussed in the Frank
6 Statement?

7 A. Yes.

8 Q. Let me show you Plaintiffs' Exhibit 510,. Do
9 you recognize this as an internal memo dated July 24,
10 1958 from a Mr. Mace to a Mr. DuPuis?

11 A. Yes.

12 Q. Do you recognize Mr. DuPuis as a gentleman who
13 was in the R&D department at Philip Morris back at
14 that time?

15 A. I don't remember the name. The document isn't
16 -- I'd have to read the document to see if it refers
17 to it as Philip Morris.

18 Q. Based upon the Bates stamp number it appears
19 that it was produced from the files of Philip
20 Morris.

21 (Witness reviewing document.)

22 Q. If you'd look at page 2 of this Exhibit and the
23 last paragraph that appears on that page, do you see
24 the statement, quote, "I know this sounds like a wild
25 program, but I'll bet that the first company to

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1 produce a cigarette claiming a substantial reduction
2 (say 50% less than the present Parliament and Kent)
3 in tars and nicotine, or an ersatz cigarette whose
4 smoke contains no tobacco tars, and with good smoking
5 flavor, will take the market."

6 Do you see that statement?

7 A. Yes.

8 Q. This would be an indication that Mr. -- Mr.
9 Mace, the author of this memo, is of the opinion that
10 there is -- would be a significant competitive
11 advantage to developing a safe cigarette; true?

12 MR. SCHWARTZBAUER: Objection.

13 A. Well, again, it is what it is. If it -- it says
14 if he produces a product with 50 percent of the tar I
15 guess, tar and nicotine of Parliament and Kent, that
16 -- or something even with less tar and has good
17 flavor will, quote, "take the market".

18 Q. Would you agree that that would appear to be a
19 reasonable assessment of the situation as it existed
20 in 1958?

21 MR. SCHWARTZBAUER: Objection.

22 Q. Relative to health concerns related to smoking?

23 A. No. We know that's not true because it wasn't
24 too long after this that there were such product in
25 the market and they didn't take the market. This --

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1 I don't remember these people, but having -- having
2 read a lot of documents and talked to a lot of R&D
3 people I would guess Mr. Mace is in R&D rather than
4 marketing. So I think we know that's not true and if
5 some -- if -- for lots of reasons. One, because of
6 what we know that happened; and two, any situation
7 like this, if there was anything like this true
8 someone else would have -- the others would have come
9 in with similar products and it would keep you from
10 so-called taking the market.

11 Q. But Mr. Mace doesn't point out in this
12 particular statement that in order to take the market
13 the company would not only have to have such a
14 cigarette but they would have to market the cigarette
15 in such a way that the consuming public understood
16 that the new cigarette was substantially safer than
17 any existing cigarette; true?

18 MR. SCHWARTZBAUER: Objection.

19 A. Well, that's a -- it -- it's unclear. I mean I
20 -- I agree that my interpretation of this is that
21 you'd market this explicitly based on -- in some way
22 based on the health benefit -- the health benefit, if
23 you could -- if you could come up with evidence that
24 would support, and that in fact is what a number of
25 companies were doing at this exact same time.

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1 Q. But the companies that were -- were advertising
2 lower tar and nicotine in the late 50s, that was
3 occurring at the very time that Mr. Mace wrote this
4 memo to Mr. DuPuis; correct? The supposed tar wars
5 occurred in the late 50s?

6 A. Began in the first tar wars, yeah. These were
7 the filter wars actually going on at this time. This
8 is 58. I don't know whether -- I think this is the
9 beginning of the tar wars.

10 Q. But none of those cigarettes made the claim that
11 they were safe to smoke in the sense that the smoker
12 would not contract cancer or other diseases as a
13 result of smoking; true?

14 A. The FTC's concern is that those were the --
15 those were the implied claims, and there were
16 situations where they got seeming medical support for
17 filters say in the case of Kent, if I recall, and
18 later with other ones.

19 Q. But the claims could be made as long as there
20 was adequate support for the claims?

21 A. No. That's the whole point.

22 Q. You're saying the FTC as you understood it took
23 the position that regardless of how supportable the
24 claims are, you simply cannot make them?

25 A. What evolved, as we know that happened, is that

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1 the FTC took a very dim view of all this because they
2 viewed the claims as I don't care whether they're
3 supported, you know, whether a particular test shows
4 that there's less tar or even that there's, you know,
5 less mouse skin eruptions, because that doesn't prove
6 that this cigarette's safer. That was the whole --
7 that these claims -- these claims, even though if
8 they were correct, absolutely correct and based on
9 reliable studies, were material -- were implied
10 claims that the cigarette was healthier, and that was
11 -- there was no basis for that in the FTC's view and
12 that's why it tried to shut and did shut all this
13 advertising down.

14 Q. But the FTC took the position that if you were
15 going to claim that the cigarette was safe or
16 healthier you had to have a valid basis to claim
17 that?

18 A. No, the FTC took the position that there wasn't
19 -- in reality that there wasn't such a claim, you
20 couldn't -- there wasn't such a basis.

21 Q. The FTC took the position that regardless of
22 what any tobacco company brings to us by way of
23 support for a health related claim, it will be
24 rejected before we even see it, before we even
25 analyze it?

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1 A. No, I wouldn't say that the FTC did that. I'm
2 saying what the FTC's position was is that even a
3 valid study, scientific study saying that this thing
4 actually had low tar by some acceptable measure or
5 that this thing, which I don't think there were any
6 marketed like this, that -- at this time at least,
7 that doesn't produce mouse skin tumors would be an
8 implied claim that it's safer, and you wouldn't have
9 a basis for that. That wouldn't produce -- that
10 wouldn't provide a basis for supporting that implied
11 claim.

12 Q. Well are you aware of some study that has
13 demonstrated that reduced tars will preclude health
14 problems?

15 A. No, actually the whole -- well it's -- I'm sure
16 you know and it's in my report, what happened, if you
17 recall, the FTC leaned on the companies and got them
18 to stop doing all of it and in principle agreed not
19 to do any of this advertising at all, in particular
20 about tar and nicotine or anything like this, and as
21 a result of pressure from the medical community and
22 Readers Digest they finally recanted and said, okay,
23 you can do tar and nicotine -- you can advertise tar
24 and nicotine ratings and we'll decide how the ratings
25 will be done, so it acquiesced. The FTC took the

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1 position, to do that it said, Well, these aren't
2 implied -- tar and nicotine claims are not implied
3 health claims, which is what it treated them as
4 before. It was a little bit of bureaucratic jujitsu,
5 but bowing to public pressure, and from the medical
6 community by people like Dr. Wynder who said, you
7 know, this isn't a good policy because he thought
8 that if -- if in fact cigarettes were produced as
9 this gentleman wanted to do, 50 percent less, he was
10 of the view that they would be significantly safer.

11 Q. Now are you aware of any cigarette company that
12 ever considered using a warning in connection with
13 their cigarette products prior to the point in time
14 when they were forced to use warnings by the federal
15 government?

16 A. Any cigarette company anywhere in the world?

17 Q. In the United States.

18 A. I don't know whether any -- I -- I think they
19 thought about that in the context of the regulatory
20 climate as an option, but -- a preemption, but I
21 don't think --

22 Q. What documents have you seen to support that
23 conclusion, if any?

24 A. I think -- well, I -- we have documents talking
25 about what the industry or other companies were

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1 thinking about the warning label issue.

2 Q. Well --

3 A. And I think -- and I have -- I think there's

4 actually more in the public domain than in the

5 documents about what was going on.

6 Q. Are you aware of any documents that suggested

7 that any of the domestic tobacco companies considered

8 the possibility that they would gain an economic --

9 or gain a competitive advantage, rather, if they

10 issued warnings?

11 A. I don't remember such a document.

12 Q. Would it surprise you if any one of the domestic

13 companies considered that possibility?

14 A. No.

15 Q. Because if any company adopted a warning on its

16 cigarettes prior to mandatory action by the

17 government, that company might well be of the view

18 that although their sales might dip short-term that

19 in the long-term they would gain market share by such

20 conduct?

21 A. Well I don't remember the document if there was

22 one. I mean I -- that's a possibility. I think more

23 -- my guess if I was doing the strategizing for the

24 company, I would think that the advantages might be

25 being able to effect the eventual regulatory process,

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1 preempt the -- preempt the regulatory, which has
2 happened in some situations, industry situations, is
3 preempted regulation, or maybe it would reduce my
4 litigation risk, which would also be a factor.

5 MR. GILL: I need a number on this one
6 here.

7 (Plaintiff's Exhibit 3527 marked for
8 identification.)

9 Q. Showing you Exhibit 3527, does this appear to be
10 a confidential memorandum dated September 30, 1963
11 from a F.S. regarding Liggett & Myers?

12 A. Yes.

13 Q. Is this one of the documents that you reviewed
14 in preparation for your deposition that was
15 designated by the State of Minnesota and Blue Cross
16 Blue Shield?

17 A. If it -- was this one that you noticed in
18 connection with this deposition?

19 Q. Yes.

20 A. Yeah, then I -- then I imagine I've seen it.

21 Q. You don't have any recall of that as you look at
22 it now?

23 A. No, I don't.

24 Q. Would you look at page 3. Down near the bottom
25 of page 3 the author suggests the advisability of

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1 using a very modest warning on Liggett & Myers
2 cigarette packages. Do you see that?

3 MR. SCHWARTZBAUER: Object to the form.
4 Counsel, my copy isn't legible. I'm not sure, is
5 yours legible, Dr. Scheffman?

6 THE WITNESS: Well I can't read the left
7 margin except for the last sentence.

8 MR. GILL: Mine on page 3 is not completely
9 legible in terms of the left margin either, but the
10 -- the -- the text to which I'm referring is legible
11 at the bottom.

12 MR. SCHWARTZBAUER: I'm sorry. Could I
13 have -- I missed the question. I apologize.

14 BY MR. GILL:

15 Q. Let me ask it again.

16 Do you see that the author is recommending the
17 advisability of Liggett & Myers placing a relatively
18 modest warning on its cigarette packages at the
19 bottom of page 3?

20 A. Well, we can -- we can read the indented
21 language. I don't know what -- the language, we
22 can't read the sentence before it, but it says -- I
23 understand it sounds like rather than recommending
24 they're actually going to do it.

25 Q. Going to do it. But the warning would be

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1 simply, quote, "People concerned about their use of
2 tobacco products should consult their physician";
3 correct?

4 A. Yes.

5 Q. And in September of 1962 this is prior to the
6 issuance of the Surgeon General's first report?

7 MR. EISZNER: Did counsel misspeak?

8 MR. SCHWARTZBAUER: Second report.

9 MR. EISZNER: You said 1962?

10 MR. GILL: Yes.

11 MR. SCHWARTZBAUER: The document was 1962.

12 MR. EISZNER: I'm sorry.

13 BY MR. GILL:

14 Q. The memo was 1962; correct?

15 A. Yes.

16 Q. And that would be prior to the issuance of the
17 Surgeon General's first report on smoking, which
18 occurred in 1964; correct?

19 A. Yeah, except the -- and I don't -- a lot of the
20 stuff came out -- well it was actually the -- see,
21 there was the advisory committee to the Surgeon
22 General actually did the study and advised him, and
23 if I remember right, that became public prior to the
24 Surgeon General's report, so I don't know whether --
25 I don't know whether it was as early as this. There

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1 was a lot of -- that committee was going on, went on
2 for several -- a number of years, it was going on
3 before this. I mean there was a lot of discussion in
4 the public and the cigarette companies about how it
5 was likely to come out.

6 Q. The cigarette companies were certainly waiting
7 to see what the Surgeon General's report was going to
8 say with some interest; correct?

9 A. Yes.

10 Q. And the author then after proposing this warning
11 goes on to suggest that to follow such a procedure,
12 he believes, might have an immediately adverse effect
13 on the sale of all tobacco products. Do you see
14 that?

15 MR. SCHWARTZBAUER: Objection.

16 A. That's his conclusion.

17 Q. Okay. And then he goes on to suggest that he
18 doesn't believe that Liggett's products would be
19 adversely affected although the initial impact on its
20 brand might be more acute?

21 A. I think you missed the "only" in the sentence,
22 but -- didn't you?

23 Q. All right. He doesn't believe that only
24 Liggett's products would be adversely affected,
25 although the initial impact on Liggett's brand might

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1 be more acute --

2 A. Yes.

3 Q. -- if it adopted this warning?

4 A. Yes.

5 Q. Then he goes on to suggest that the immediate
6 adverse effect of taking this action might not be as
7 great as the adverse effect resulting immediately
8 from the publication of the Surgeon General's report?

9 A. Yes.

10 Q. So assumedly he's suggesting this course of
11 conduct before the Surgeon General's report has been
12 issued?

13 A. Oh, yeah. No, I agree that this was prior to
14 the issuance of the report.

15 Q. Then in the following paragraph he suggests that
16 by adopting this action and making this public
17 announcement Liggett's brand would achieve a much
18 faster growth during the recovery period than the
19 other brands and at their expense; do you see that?

20 A. Yes.

21 Q. And he doesn't believe that adopting this
22 warning would increase the ultimate hazards of health
23 litigation?

24 A. Yes.

25 Q. He then goes on to say if the entire industry

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1 were consulted on such a move, there wouldn't be any
2 economic advantage that Liggett would realize.

3 A. No, that's not what he said. He says that no
4 decision would be reached in time.

5 Q. And Liggett would gain no competitive advantage;
6 correct?

7 A. But because -- because -- because the group
8 would never be able to agree on exactly what it would
9 be before the Surgeon General's report would issue.

10 Q. That, and if the whole cigarette industry issued
11 the same warning, then obviously Liggett wouldn't
12 gain any competitive advantage vis-a-vis any other
13 member of the industry?

14 A. This --

15 MR. SCHWARTZBAUER: Objection.

16 A. This doesn't say that at all. It says what it
17 says.

18 Q. You don't think that follows?

19 A. We're talking about what this says. It
20 definitely does not say that and it wasn't his
21 conclusion.

22 Q. And he suggests that the rest of the industry
23 would be upset if Liggett adopted his suggestion;
24 correct?

25 MR. SCHWARTZBAUER: Objection.

1 A. It says what it says, that he thinks they
2 wouldn't be popular in the industry if they -- if
3 they went ahead and did this.

4 Q. So this author has reached the conclusion that
5 Liggett could well gain market share eventually if it
6 were perceived by the smoking public as being more
7 reliable and trustworthy than other cigarette
8 manufacturers?

9 MR. SCHWARTZBAUER: Objection.

10 Q. True?

11 A. I don't know. The author at the -- I would put
12 it as he thought that -- I'd put it that they would
13 get brownie points for which they might be rewarded
14 in terms of getting sales back a little more quickly
15 than the folks who hadn't done this.

16 Q. But gaining market share at the expense of other
17 competitors, that's what the author suggested;
18 correct?

19 A. That would -- that's an implication of what it
20 says, yes.

21 Q. Well it's not only an implication, he says it
22 directly; does he not?

23 A. I don't think he talks about market share, but
24 he says sales -- sales are going to go faster than
25 the other folks so we're going to have to increase

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1 the shares.

2 Q. And at the expense of the other folks?

3 A. Yes.

4 Q. And the other folks would be Liggett's tobacco
5 competitors?

6 MR. SCHWARTZBAUER: Objection.

7 A. Yes.

8 Q. Let me show you Plaintiffs' Exhibit 134. Do you
9 recognize this as a -- an internal Philip Morris
10 memorandum dated November 15, 1968?

11 A. Yes.

12 Q. From Mr. Wakeham to Mr. Goldsmith?

13 A. Yes.

14 Q. And who is Mr. Wakeham?

15 A. He certainly was someone -- I can't remember his
16 title at this time. He's someone high up, if not the
17 head of R&D, for Philip Morris Tobacco, if not Philip
18 Morris in general.

19 Q. And do you know who Mr. Goldsmith was in 1968?

20 A. No.

21 Q. Mr. Wakeham states directly in the first
22 sentence of the memo, quote, "Most Philip Morris
23 products, both tobacco and non-tobacco, are directly
24 related to the health field." Did I read that
25 correctly?

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1 A. Yes.

2 Q. Would you agree that if Philip Morris's tobacco
3 products caused cancer and other diseases they would
4 be directly related to the health field in terms of
5 affecting the consumption of health care services?

6 MR. SCHWARTZBAUER: Objection.

7 A. Well, that's not what he's talking about here at
8 all. I don't know what this has to do with that.

9 Q. Well, could you answer my question?

10 A. But you gave the predicate of the sentence.
11 This sentence isn't talking about that at all, so --

12 Q. If Philip Morris tobacco products caused cancer
13 and other diseases, would you agree that consumption
14 of those products would directly affect the amount of
15 health care services required?

16 MR. SCHWARTZBAUER: Objection.

17 A. Well, we -- I think you asked this before and I
18 said I'm not an expert on that, but -- and I answered
19 it a number of times.

20 Q. And what was your answer?

21 A. My answer was I'm not an expert and -- and if
22 you're talking about the total impact, my -- my
23 understanding is there's countervailing effects and
24 everything, but under -- if -- we could go through
25 hypotheticals and things and if Philip Morris's --

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1 let me put it if Philip Morris's cigarette products
2 directly result in -- resulted in lung cancer and
3 people got lung cancer as a result of that, for those
4 people they would have borne health care costs, you
5 know, likely borne health care costs that they likely
6 would not otherwise have borne.

7 MR. GILL: Let's -- let's stop right here.

8 (The proceedings were in recess at 5:10
9 p.m.)

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1 C E R T I F I C A T E

2 I, Judy A. Steinke, hereby certify that I
3 am qualified as a verbatim shorthand reporter; that I
4 took in stenographic shorthand the testimony of DAVID
5 T. SCHEFFMAN, Ph.D., at the time and place aforesaid;
6 and that the foregoing transcript, Volume I,
7 consisting of pages 1 through 299, is a true and
8 correct, full and complete transcription of said
9 shorthand notes, to the best of my ability.

10 Dated at Deerwood, Minnesota, this 29th day
11 of September, 1997.

12

13

14

15 Judy A. Steinke

16 Shorthand Reporter

17 Notary Public

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2 I, DAVID T. SCHEFFMAN, Ph.D., the
3 deponent, hereby certify that I have read the
4 foregoing transcript, Volume I, consisting of pages 1
5 through 299, and that said transcript is a true and
6 correct, full and complete transcription of my
7 deposition, except per the attached corrections, if
8 any.

14 _____ I have made no changes.

21 Sworn and subscribed to before me this day of

25 My commission expires _____.

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